NEW YORK LAW SCHOOL

NYLS Journal of Human Rights

Volume 13
Issue 1 *SYMPOSIUM: CRITICAL PERSPECTIVES ON MEGAN'S LAW: PROTECTION VS. PRIVACY*

Article 11

Fall 1996

Panel Discussion & Audience Questions

try to pick out this supposedly very small number of super-dangerous rapists, the false positives are going to shoot up.[752] That is where we get the figures that people generally talk about: that out of three predictions of violence, generally, one will be correct.[753]

Panel Discussion & Audience Questions

PATRICK REILLY:[754] We are being joined by an additional panelist, Daniel Feldman. He was the sponsor of the Megan's Law for New York[755] that we discussed earlier, and he will be answering questions. Mr. Feldman has been an Assemblyman in New York since 1987, and he is a frequent lecturer at a number of law schools.

We will start now with some of the questions on commitment.[756]

---

[752] *See* Francis, *supra* note 722, at 139-41.

[753] *See* Herman, *supra* note 677, at 908 (citing the prevailing acceptance of this accuracy ratio).

[754] Deputy Director of the Division of Mental Health and Advocacy of the New Jersey Department of the Public Advocate; Adjunct Professor, New York Law School.

[755] New York's "Sex Offender Registration Act" sets up a system of registration for convicted sex offenders. N.Y. CORRECT. LAW §168 (McKinney 1996). Under the statute, convicted sex offenders are required to register with local law enforcement agencies. *Id.* at §168-f. Prior to release, a Board of Examiners will assess the risk of repeat offense by the sex offender and recommend one of three levels of notification to the sentencing court. *Id.* at §168-l. The sentencing court will then make a judicial determination of the level of notification to be implemented. *Id.* at §168-n. In addition, the Division of Criminal Justice will maintain a directory of sexually violent predators which includes such information as an offender's exact address, photograph, physical description and criminal background. *Id.* at §168-q.

[756] *See, e.g.*, WASH. REV. CODE ANN. §71.09.060 (West Supp. 1992). A sex offender, if found to be a sexually violent predator, can be committed to the custody of the department of social and health services for treatment until the offender's disorder has changed in such a manner that he or she may be deemed safe to return to the community. *Id.* MINN. ST. ANN. §609.1352 (West 1996). An individual can be committed to the commissioner of correction for the statutory maximum punishment upon a finding that "the crime was motivated by the offender's sexual impulses or was part of a predatory pattern of

These questions have been put together by the students in the Civil Law and Human Rights Clinic at New York Law School.

These statutes require both a prediction that the offender is dangerous and that he or she poses a high risk of re-offending.[757] How accurate are predictions in this area? Do you have any more data on the accuracy of the prediction of dangerousness for sex offenders?

ERIC JANUS: Yes. There exists a big controversy concerning prediction accuracy,[758] but there are several basic principles to understand about prediction. First, it is well established that actuarial or statistical means of prediction[759] are more accurate, or at least better, than clinical predictions that are based on impressionistic information.[760]

---

behavior . . . . [T]he offender is a danger to public safety; and the court finds that the offender needs long-term treatment or supervision beyond the presumptive term of imprisonment . . . ." *Id.*

[757] *See, e.g.*, N.Y. CORRECT. LAW §168-l (McKinney 1996).

[758] *See* Morse, *supra* note 521, at 127 n.39 (noting that prediction accuracy rates are often overstated and that older research models are criticized as being flawed).

[759] An actuarial or statistical prediction is a numerical prediction that a person with certain characteristics will act a certain way "within a fixed period." *See* Christopher Slobogin, *Dangerousness and Expertise*, 133 U.PA. L. REV. 97, 110-11 (1984). Characteristics used to establish actuarial predictions could include a person's age, sex, arrest record, and marital status. *Id.* at 122.

[760] Clinical predictions are performed by mental health experts who look for characteristics of dangerousness in an individual during personal interviews. Slobogin, *supra* note 759, at 109. The expert seeks information about the individual's background and current mental health status, and may speak with the individual's family and friends to determine the individual's current psychological state and past behavior. *Id.* Clinical methods of prediction are far more reliable due to the high false positive rates they generate. *Id.* at 110-11. In addition, actuarial predictions have advantages over clinical predictions because they include personal information which requires less guesswork to obtain. *Id.* at 122. Some researchers believe that clinical predictions are highly inaccurate because they are "intuitive assessments" which need reinforcement by statistical predictions. Marc Miller & Martin Guggenheim, *Pretrial Detention and Punishment*, 75 MINN. L. REV. 335, 378-79 (1990). *See also id.* at 378. "The most accurate predictions - and the type that can be most easily tested, verified, and challenged - are based on statistical or actuarial methods applied to largely objective criteria such as age, criminal record, employment, and education." *Id.* *But see* George E. Dix, *Clinical Evaluation of the "Dangerousness" of "Normal"*

The best actuarial work now is in the range of seventy-five percent correct identification of people who will recidivate and those who will not.[761] However, you cannot stop there. You must understand what the base rate of violence is in the population with respect to which you are predicting.[762] The lower the base rate, that is to say, the more infrequent the phenomenon, then the higher the rate of error is going to be.[763] If you are trying to select only the most dangerous people, then you are going to have a relatively low base rate, and the possibility or the probability of error is going to increase dramatically.[764]

AUDIENCE MEMBER: Can you make a distinction between the recidivists who have been voluntarily committed to treatment and those who have not?

Defendants, 66 VA. L. REV. 523, 530 (1980) ("whether actuarial predictions are likely to be more accurate than clinical predictions is much debated").

[761] *See* James E. Hooper, Note, *Bright Lines, Dark Deeds: Counting Convictions Under the Armed Career Criminal Act*, 89 MICH. L. REV. 1951, 1962 (1991) (asserting, in a discussion of the criminality construct models criminologists use to predict recidivism, that "error rates in these models can be quite substantial; even the better models achieve only seventy percent accuracy").

[762] Base rates are established to determine probabilities that certain groups will commit a crime. *See* Jeffrey Fagan & Martin Guggenheim, *Preventive Detention and the Judicial Prediction of Dangerousness for Juveniles: A Natural Experiment*, 86 J. CRIM. L. & CRIMINOLOGY 415, 425 (1996); *see also* Slobogin, *supra* note 759, at 110, n.9. A base rate for violent behavior within a particular population with certain characteristics can be established by using actuarial data. *Id.*

[763] *See, e.g.*, Quinsey, et al., *supra* note 742, at 85. "Under low base rate conditions, a prediction that nobody will commit a violent act will lead to a higher accuracy than a prediction that certain individuals will commit a violent act." *Id.*

[764] *See* Fagan & Guggenheim, *supra* note 762, at 426 (suggesting that because "[v]iolent criminality is a rare event" base rates would be low given the fact that there would be fewer people to include in the base, and that low base rates lead to questionable prediction accuracy).

ERIC JANUS: There are some studies that do make that distinction.[765] One of the best that I know of comes from Dr. Vernon Quinsey.[766] He reviewed all of the recidivism studies and did a weighted average to derive recidivism figures as follows: approximately eighteen or nineteen percent for non-familial child molesters; that is, non-incest, heterosexual child molesters; homosexuals are higher; heterosexuals are lower at 18.6 percent; for rapists it was in the range of twenty-three or twenty-four percent.[767] When you take those figures and combine them with the seventy to seventy-five percent accuracy rate, and a recidivism rate of eighteen percent, then approximately thirty-seven percent of your predictions of violence are going to be correct.[768]

AUDIENCE MEMBER: You did not answer the question about treatment. Many treatment programs around the country are not voluntary.[769] For instance, Megan's offender went to treatment, but did not really participate in treatment.[770] There are people who really want to change, but there others, as you say, who should be committed

---

[765] *See generally* Vernon Quinsey, et. al., *Assessing Treatment Efficacy in Outcome Studies of Sex Offenders*, 9 J. INTERPERSONAL VIOLENCE 512, 523 (1993) (discussing numerous studies of recidivism rates).

[766] Dr. Vernon Quinsey is the author and co-author of dozens of books, articles and studies regarding violent crime, criminal behavior, and recidivism. For a partial, but comprehensive listing of his works, *see id.* at 103-05.

[767] *See generally* Vernon L. Quinsey, et al., ASSESSING DANGEROUSNESS: VIOLENCE BY SEXUAL OFFENDERS, BATTERERS AND CHILD ABUSERS 114 (Jacqueline C. Campbell ed.) (1995).

[768] *Id.*

[769] *See generally* Jessica Willen-Berg Note, *Give Me Liberty or Give Me Silence: Taking a Stand on Fifth Amendment Complications for Court-Ordered Therapy Programs*, 79 CORNELL L. REV. 700 (1994) (arguing that therapeutic sentencing alternatives are often given as a condition for probation, and that the cooperation of the patient is a prerequisite to successful treatment).

[770] *See* Montana, *supra* note 180, at 570. Jesse Timmendequas, the man accused of the attack against Megan Kanka, received a ten-year sentence to the Adult Diagnostic and Treatment Center, also known as Avenel, of which he only served six years. *Id.*

forever.[771]

ERIC JANUS: I know that there are some studies that have shown recidivism rates for individuals coming out of treatment programs that are as low as ten or fifteen percent, and correspondingly higher for people who are untreated, yes.[772]

ALEXANDER BROOKS: With respect to the issue of dangerousness,[773] in an article I wrote, I devised a hypothetical assuming that the accuracy rate of dangerousness predictions is only fifty percent (but, obviously, the accuracy rate is much higher than that).[774] If you have two sex offenders with similar profiles, one is likely to re-offend, and the other, however dangerous he may have been in the past, is not likely to re-offend. You then have, in effect, two choices: either you confine them both or you let them both go. If you let them both go, you know that there will be one person who will commit at least one, maybe many, serious sexual offenses which will harm women and children. On the other hand, if you confine them both, then you are confining at least one innocent person, innocent being defined as not likely to re-offend in the future, but a person who has already had a record of criminal offenses.

This brings us to a value question: which group are you more

---

[771] *See* Boerner, *supra* note 556, at 529 (citing several newspaper editorials which opine that some types of criminals, like sex offenders, need to be permanently removed from society).

[772] *See generally* Robert E. Freeman-Longo and Ronald V. Wall, *Changing a Lifetime of Sexual Crime: Can Sexual Offenders Ever Alter Their Ways? Special Treatment Programs Provide Some Hope*, PSYCHOLOGY TODAY, Mar. 1986, at 58 (discussing recidivism rates among sex offenders).

[773] *See* Brooks, *supra* note 568, at 710 (defining dangerous individuals as those "who have been convicted of violent sexual crimes, and who at the time of their pending release from prison or other discharge, suffer from a mental condition that causes them to be likely to continue to engage in acts of sexual violence").

[774] *See id.* at 752 (stating that recent data shows that predictions of "future violent sexual crimes" are accurate at least 50 percent of the time, and greater than 50 percent in cases involving repeat offenders).

interested in protecting, the women and children on one hand, or the sex offenders on the other?[775]

It would be great if we lived in a world in which we never made any mistakes at all, but we do make quite a number of mistakes, and those mistakes are both constitutionally and morally acceptable because we have no alternative.[776]

AUDIENCE MEMBER: I think we do have an alternative that we keep forgetting about: prevention. The system ignores the fact that most sex offenders were offended themselves.[777] To prevent this cycle we must apply funds to help the victims of sex crimes early on.

ALEXANDER BROOKS: I agree with you entirely, but what I am suggesting is that, given the present situation, when you are confronted with two sex offenders you have no alternative.[778]

Now, if what you are saying is that we ought to do other things as well, not only do I agree with you, but if I have an opportunity later, I will explicate further. For now, one of the things that we do not adequately explore is treatment.[779] By treatment we are not talking

---

[775] *See generally, Sex-Offender Registration Laws Pit Victims' Rights Against Civil Rights*, N.Y. TIMES, Feb. 10, 1993, at L5 (discussing the impetus for, and ramifications of, sex-offender registration laws).

[776] *See* Brooks, *supra* note 568, at 753-54 (explaining that mistakes are inevitable, and distinguishing between prediction errors as they pertain to decisions to release offenders, from such errors as they relate to confining individuals). *But see In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J. concurring) (stating that "it is far worse to convict an innocent man than to let a guilty man go free").

[777] *See* Elizabeth P. Bruns, *Cruel And Unusual?: Virginia's New Sex Offender Registration Statute*, 2 WM. & MARY J. WOMEN & L. 171, 172 (1995) (reporting that ninety percent of all sex offenders were once victims of child sexual assault).

[778] *See, e.g.*, Bedarf, *supra* note 190, at 910 (discussing how "[c]ommunity notification laws fail to discriminate between those capable of rehabilitation and those whose deviancy is permanent.").

[779] *Id.* at 898 (stating that community notification laws "explicitly reject the idea that the state can rehabilitate sex offenders" by focusing on protection instead of rehabilitation).

about curing sex offenders,[780] but giving them the means to control their behavior and following up in the community.[781] I agree with you one hundred percent on that.

AUDIENCE MEMBER: I just want to say, Professor Brooks, for your future writing about the subject, you keep mentioning 'women' and 'children.' You might want to look at men as being offended against, as well. It is dramatically under reported because they are homosexual.[782]

ALEXANDER BROOKS: Yes, I am aware of that. I was attempting to simplify the presentation. Everybody in the field agrees that ninety-five percent of the victims are women and children, if not ninety-eight percent.[783]

AUDIENCE MEMBER: No, they do not agree.[784] It is under

---

[780] Julia A. Houston, *Sex Offender Registration Acts: An Added Dimension To The War On Crime*, 28 GA. L. REV. 729, 731 (1994). "'I don't think you can cure rapists...many come out worse than the way in which they went in.'" Dr. Fred Berlin, Director of the Sexual Disorders Clinic at Johns Hopkins University, *ABC News Forum: Men, Sex & Rape*, (ABC television broadcast, May 5, 1992).

[781] *See, e.g.*, Montana, *supra* note 180, at 598-99 (stating that treatment programs only teach offenders to control their behaviors, and that offenders should continue to receive treatment once they return to the community).

[782] *See, e.g.*, Liz Kowalcyzk, *Boys Victims More Than Thought*, PATRIOT LEDGER (Massachusetts), May 18, 1996, at 1, *available in* 1996 WL 8053902 (quoting the director of a Boston rape counseling program as saying "'[b]oys fear being labeled a homosexual, so [rape has] been terribly under reported'"); *see also* Susan Estrich, *Rape*, 95 YALE L. J. 1087, 1089 n.1 (1986). "The apparent invisibility of the problem of male rape, at least outside the prison context, may well reflect the intensity of the stigma attached to the crime and the homophobic reactions against its gay victims." *Id.*

[783] *See* CRAIG PERKINS & PATSY KLAUS, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION 1994, at 4 (Apr. 1996) (reporting that ninety-four percent of victims of rape, attempted rape and sexual assaults in 1994 were female).

[784] *Compare id. with* LAWRENCE A. GREENFIELD, U.S. DEP'T OF JUSTICE, CHILD VICTIMIZERS: VIOLENT OFFENDERS AND THEIR VICTIMS 2 (Mar. 1996) (noting that "three in four child victims of violence were female") *and* Kowalcyzk, *supra* note 782, at 1 (reporting that eighty percent of sex abuse victims at a Boston program are women, and twenty percent

reported.[785]

ALEXANDER BROOKS: Yes, there have been reports about men as victims, and women as sex offenders.[786]

PATRICK REILLY: I believe that [the audience member] is talking about men and women as offending against men or male children.

ALEXANDER BROOKS: Yes, in prison that is common.[787]

PATRICK REILLY: Is treatment for sex offenders, or particularly violent sex offenders,[788] ever effective? Is there any effective treatment for these disorders?

ALEXANDER BROOKS: I would like to address that question. Some time ago I firmly believed that treatment was not effective. There had been some very important outcome studies which examined the results

---

are men).

[785] *See* Kowalcyzk, *supra* note 782, at 1 (reporting that Boston social workers believe that the statistics for male rape are low because "boys are less likely to tell"); PERKINS & KLAUS, *supra* note 783, at 1 (noting that "almost two-thirds of victims of completed rapes did not report the crime to the police").

[786] A 1993 survey of rapes in New York reveals that out of 1,930 rape arrests, men accounted for over 1,909, while only twenty-one women were arrested for the crime. *See* DIVISION OF CRIMINAL JUSTICE SERVICES, NEW YORK STATE, 1993 CRIME AND JUSTICE ANNUAL REPORT, at 21 (1994).

[787] *See generally* David M. Siegal, *Rape in Prison and AIDS: A Challenge for the Eighth Amendment Framework of* Wilson v. Setter, 44 STAN. L. REV. 1541, 1542-43 (1992) (discussing the high incidence of homosexual rape in prison and the spread of HIV infection).

[788] Both phrases are legal rather than medical terms. *See, e.g.*, DSM-IV, *supra* note 606, at 527-28 (omitting any reference to violence in its definition of pedophilia). Various sex offender statutes categorize the crime by the degree of violence involved. *See, e.g.*, N.Y. CORRECT. LAW §168-l(5)(b)(ii)(McKinney 1996) (delineating risk factors used to assess the potential societal danger posed by sex offenders).

of treatment and non-treatment of sex offenders.[789] In those, it was determined that either there was no difference[790] or that, ironically in some cases, offenders who had been treated actually emerged from treatment and offended at a higher rate than those who had not been treated.[791]

More recently, I have become increasingly persuaded that treatment is critical. There are now entirely new treatment methods being used in institutions.[792] Many of the older treatment modalities were completely ineffective.[793] Some of them were even absurd, like masturbation satiation,[794] things of that order. There now is some renewed hope for treatment, and there are some preliminary studies which indicate that the new methods of treatment are more successful.

There are also methods of treatment that are not even in general use which hold out a great deal of promise, such as the anti-androgenic

---

[789] *See generally* Quinsey, *supra* note 765 (describing and discussing treatment results).

[790] *Id.*

[791] *Id.*

[792] *See, e.g.*, Robert J. McGrath, *Sex Offender Treatment: Does it Work?*, PERSPECTIVES, at 24 (1995) (observing that new studies show significantly better results in treating sex offenders).

[793] *See* Gordon C. Nagamaya-Hall, *Sexual Offender Revisited: A Meta-Analysis of Recent Treatment Studies*, 63 J. CONSULTING & CLINICAL PSYCHOL. (No. 5) (1995) (citing Lita Furby, et al., *Sex Offender Recidivism: A Review*, 106 PSYCHOL. BULL. 3 (1989) (stating that there is no conclusive evidence that treating offenders lowers their recidivism rates)).

[794] *But see* Marty Klein, *Sex, Crime & Punishment: Are We Willing to Rehabilitate Sexually Dangerous People?*, PLAYBOY, May, 1995, at 44. Masturbation satiation is a reconditioning treatment used with sex offenders. *Id.* "After masturbating to climax, offenders continue masturbating for two more hours to fantasies of inappropriate behavior." *Id.* "The refractory period makes arousal difficult, and the repetitive fantasies gradually become boring and even irritating." *Id.* The technique was pioneered by Dr. Gene Abel, who reported success rates of more than eighty percent. *Id. See also generally* P. Johnston, et. al., *The Effects of Masturbatory Reconditioning With Nonfamilial Child Molesters* 30 BEHAV. RES. THERAPY 559 (Sept. 1992) (discussing the nature and efficacy of masturbation satiation).

treatments.[795] Depo-Provera, for instance, is a drug that suppresses sexual drive.[796] The idea behind the use of that drug is that, particularly with pedophiles, who have enormous drives,[797] if you use that sex-drive-suppressing drug[798] and combine it with other treatment modalities,[799] you can help these offenders. This assumes, of course, that they are motivated to control their urges. Particularly if you have follow up in the community so that after these offenders receive that treatment and are released, they are monitored, supervised,[800] and helped with various programs.[801] You must constantly reinforce them.[802] Nevertheless, if you

---

[795] *See generally* Fred S. Berlin & Carl F. Meinecke, *Treatment of Sex Offenders with Anti-androgenic Medication: Conceptualization, Review of Treatment Modalities, and Preliminary Findings*, 138 AM. J. PSYCHIATRY 601 (1981) (explaining that anti-androgenic treatment involves hormonal injections which, in preliminary studies, have shown to result in a noticeable reduction in sexually deviant activity).

[796] Linda S. Demsky, *The Use of Depo-Provera in the Treatment of Sex Offenders: The Legal Issues*, 5 J. OF LEGAL MED. 295, 296, 300 (1984) (stating that an individual's sex drive is substantially decreased when subject to Depo-Provera injections).

[797] *See, e.g.*, Alan Cairns, *"Threat to All Children;" Expert Says Pedophilia Can't Be Cured*, TORONTO SUN, May 11, 1996, at 25. Dr. Robert Dickie, a psychiatrist at the Clarke Institute of Psychiatry, affirms that "[a] pedophile's sexual desire for children runs as deep as the heterosexual urge to procreate. . . ." *Id.*

[798] *See* Demsky, *supra* note 796.

[799] *See generally* A. Kenneth Fuller, *Child Molestation and Pedophilia: An Overview for the Physicians*, 261 JAMA 602, 608-09 (1989) (recommending that drug treatment be used in conjunction with other treatment modalities such as psychotherapy and behavior therapy).

[800] *See, e.g.*, Arthur J. Lurigio et al., *Child Sexual Abuse: Its Causes, Consequences, and Implications for Probation Practice*, 59 FED. PROBATION 69, 75 (1995) (recommending that "probation departments...implement specialized units to monitor sex offenders in conjunction with the offender's therapist, employer, and family").

[801] *See, e.g.*, Freeman-Longo and Wall, *supra* note 772, at 59 (explaining the rehabilitative significance of participation in an outpatient, aftercare counseling program).

[802] *See, e.g., id.* (maintaining that sexually deviant behavior is usually "deeply ingrained . . . and most sex offenders need extensive psychological help" to alter their behavior patterns).

prevent a certain number of sex offenses by use of this treatment,[803] even though you can anticipate a certain amount of failures,[804] you are ahead of the game. On the other hand, it costs a great deal of money.[805] That is something that states are very unwilling to expend.[806]

But it would take too long for me to discuss more general issues here. I do want to say that I join with those who assert that there is a certain segment of sex offenders who are motivated to change,[807] who are treatable,[808] who, if given treatment, can prevent themselves from engaging in sex offenses.[809] That is better than sending them to prison after they have done it.[810] It is better than community notification.[811] It

---

[803] *Id.* at 64 (asserting that untreated sex offenders are eighty percent more likely to re-offend, while those who complete treatment programs are estimated to manifest only a ten and twenty-five percent likelihood to re-offend).

[804] *See* McGrath, *supra* note 792, at 24, 26 ("[Treatment] does not work with all sex offenders, and all treatments do not work equally well....").

[805] *See, e.g.*, Freeman-Longo & Wall, *supra* note 772, at 64 (stating that "the expense of treatment . . . may be greater than the cost of imprisonment without treatment. . . ."). *But see* McGrath, *supra* note 792, at 25 (estimating a substantial cost savings to the state of Vermont when sex offenders receive treatment and, thereby, do not re-offend).

[806] *See, e.g.*, Freeman-Longo& Wall, *supra* note 772 at 64 ("Many state-sponsored treatment programs now exist tenuously, viewed with ambivalence by a public uncertain that sex offenders 'deserve' more than the punishment of prison, concerned about the expense of treatment . . . .").

[807] *Id.* (asserting that "those who participate in voluntary treatment programs . . . may be somewhat more motivated to change than the average sex offender").

[808] *See* McGrath, *supra* note 792, at 24 (discussing a 1993 analysis of sex offender recidivism which noted a recidivism rate of 10.9 percent for treated offenders, and 18.5 percent for untreated offenders). *But see* Lita Furby, et al., *Sex Offender Recidivism: A Review*, 105 PSYCHOL. BULL. 3, 27 (1989) ("There is as yet no evidence that clinical treatment reduces rates of sex re-offenses in general and no appropriate data for assessing whether it may be differentially effective for different types of offenders.").

[809] *See, e.g.*, Lurigio, *supra* note 800, at 73. "[T]reatment is designed to help [sex offenders] cope better with feelings and events that put them at risk for subsequent sex crimes." *Id.*

[810] *See* Freeman-Longo& Wall, *supra* note 772, at 58. "[I]mprisonment, far from being a deterrent, may have exacerbated [a sex offender's] problems." *Id.*

is better than so many other things. A lot of effort has to be put into it, but it will work with a significant group of sex offenders.[812]

ROBERT FARLEY: If I may address that. One of the problems with that outlook is that the failures in this type of crime—especially when you are talking about pedophiles—are unacceptable when you consider the degree of severity of the crime and the impact that it has on the victim, an impact that can so deeply and severely scar that victim.[813] Society has to take a look at whether that crime should be punished effectively, not by commitment, but by a life imprisonment sentence.[814] That is the most effective deterrent, according to this Attorney General, that you are going to have. Pedophiles have a recidivism rate which is through the ceiling.[815] I was just talking with a representative of the Manhattan District Attorney's Office and the statistics that I have seen, and the statistics that she deals with on a daily basis, are in the ninety

---

[811] *See, e.g.*, Michael L. Bell, *Pennsylvania's Sex Offender Community Notification Law: Will it Protect Communities from Repeat Sex Offenders?*, 34 DUQ. L. REV. 635, 656 (1996). "[A] large number of released sex offenders subjected to community notification laws report false addresses or never register with the proper authorities." *Id.*

[812] *See, e.g.*, Freeman-Longo& Wall, *supra* note 772, at 64. "Most untreated sex offenders released from prison go on to commit more offenses - indeed, as many as eighty percent do. By contrast, the recidivism rate for sex offenders who have completed state-run treatment programs is . . . between ten and twenty-five percent." *Id.*

[813] *See, e.g.*, Lurigio, *supra* note 800, at 70. "Immediately following sexual abuse, twenty percent to forty percent of molested children exhibit psychiatric problems...." *Id.*

[814] *See, e.g.*, Campbell, *supra* note 389, at 562 (asserting that "New Jersey must ensure that all violent child sex offenders are given extended sentences in view of the devastating and lifelong consequences suffered by the victims of sex crimes. . ."). *But see* Goodman, *supra* note 6, at 776 (explaining that psychiatrists have not yet determined that sex offenders are criminals and deserve to be criminally punished, and that some professionals believe that offenders are mentally ill and only require medical treatment).

[815] *See generally* Tracy L. Silva, *Dial '1-900-Pervert' and Other Statutory Measures that Provide Public Notification of Sex Offenders*, 48 SMU L. REV. 1961 (1995) (surveying sex offender legislation throughout the country).

percent range.[816] It is unacceptable. You are going to have that scar on these children for life. You should have a system which is set up to be deal with the criminal justice system rather than the civil commitment system.[817] The latter entails a lower threshold.[818] When a violent sexual predatory offense is committed by a pedophile, we should consider, as a society, whether the offender should receive a life imprisonment term.[819] It is a balancing test with society considering whether that person is going to commit that crime again.[820] Should we take that chance? If he or she is duly convicted in a court of law, perhaps he or she should, on that basis, never get out.

PATRICK REILLY: I think we had testimony earlier that being civilly committed, which only requires clear and convincing evidence,[821] actually keeps offenders incarcerated longer in Minnesota than does

---

[816] The reported recidivism rates vary. *See, e.g.*, David Van Biema, *A Cheap Shot at Pedophilia: California Mandates Chemical Castration for Repeat Child Molesters,* TIME, Sept. 9, 1996, at 60 (stating that the recidivism rate may only be sixty-five percent); Thomas J. Reed, *Reading Goal Revisited: Admission of Uncharged Misconduct Evidence in Sex Offender Cases,* 21 AM. L. CRIM. L. 127, 154 (1993) (stating that the recidivism rate among sex offenders is fifty percent).

[817] *See* Morse, *supra* note 521, at 121-22 (discussing how criminal confinement and civil commitment differ in purpose and effect).

[818] *Id.* "Civil commitment does not require the same procedural protections as criminal incarceration because the detention is not punishment . . . ." *Id.*

[819] *See, e.g.*, Campbell, *supra* note 389, at 522. "Research shows that the general public overwhelmingly favors keeping sex offenders incarcerated." *Id.*

[820] *See, e.g.*, Doe v. Poritz, 662 A.2d 367, 398 (N.J. 1995). In response to the defendant's motion to enjoin enforcement of New Jersey's sex offender registration and notification statute, the Court stated: "[a]s the punitive impact becomes more pronounced . . . the balance may shift and the fact of punishment may overwhelm the purity of the government's action, imputing to it, perhaps for doctrinal consistency, perhaps incorrectly, a punitive purpose." *Id.*

[821] *See* Addington v. Texas, 441 U.S. 418 (1979). Here, the Court held that in civil commitment proceedings the 'beyond a reasonable doubt' standard of proof places too high a burden on the state given diagnostic uncertainties. *Id.* at 432. The Court further held that to satisfy due process requirements, the clear and convincing evidence standard is adequate. *Id.* at 433.

being criminally convicted, because no one got out in Minnesota.[822]

ROBERT FARLEY: The issue of commitment raises more constitutional questions than do straight sentences.[823] But at least that puts people on warning before they do anything.[824] If you predatorially sexually attack a child, then you are going to go to jail for the rest of your life.[825]

AUDIENCE MEMBER: Do you distinguish between the different kinds of pedophilia. For instance, whether it is predatory?

PATRICK REILLY: [The audience member] is asking about distinguishing between the various kinds of pedophilia, such as

---

[822] It has been argued that "a psychopathic personality condition is untreatable, and, therefore, [civil] confinement is equivalent to life-long preventative detention." *In re* Blodgett, 510 N.W.2d 910, 916 (Minn. 1994).

[823] *See, e.g., id.* The defendant, who challenged his commitment under the Minnesota Psychopathic Personality Commitment Act (MINN. STAT. ANN. §526.09-.10 (West 1992)), raised substantive and procedural due process claims based on the possibility of indefinite commitment. *Id.* Call v. Gomez, 535 N.W.2d 312 (Minn. 1995). Call, who was committed as mentally ill and dangerous, claimed that his continued civil commitment constituted double jeopardy. *Id.*

[824] *See, e.g.*, Brian G. Bodine, *Washington's New Violent Sexual Predator Commitment System: An Unconstitutiond Law and an Unwise Policy Choice*, 14 U. PUGET SOUND L. REV. 105, 139 (1990) (stating that "a potential sex offender will more likely be deterred by the threat of a long prison sentence than by that of detention in a state mental facility").

[825] In California, punishment for sexual offenses ranges from life imprisonment without parole for twenty-five years, to life imprisonment without parole for fifteen years. Zamoyski, *supra*, note 535, at 1253-54. However, for both first-time and habitual sex offenders, the opportunity for parole is prohibited until the offender has served eighty-five percent of the minimum sentence. *Id.* In Minnesota, the sex offender can be put in prison for a maximum of forty years, or can be confined indefinitely for psychiatric treatment if the offender poses a danger to public safety. MINN. STAT. ANN. §609.1352 (West Supp. 1996).

predatory and incestuous.[826]

AUDIENCE MEMBER: Also, you did say that there are certain kinds [of offenders] that might not be treatable, such as the ones which involve fixations.[827]

ROBERT FARLEY: The bill that we have submitted to the legislature does not distinguish among those varieties.[828] It is the conduct of the individual who commits that crime that is relevant: what he does, not who he is.[829]

AUDIENCE MEMBER: But as far as treatment is concerned, for some people treatment works,[830] for others, it does not.[831]

---

[826] Pedophilia is legally defined as "a desire for, an attempt at, or actual consummation of sexual relations with a prepubescent child and encompasses both heterosexual and homosexual activity." Adrienne L. Hiegel, *Sexual Exclusions: The Americans with Disabilities Act as a Moral Code*, 94 COLUM. L. REV. 1451, 1474 n.129 (1994). A predatory pedophile is one who consciously seeks out children for the purpose of obtaining sexual gratification from them to quench his desires. *See* United States v. Surratt, 867 F.Supp. 1317, 1324 (N.D. Ohio 1994). Incestuous pedophilia occurs when the pedophilic offense is committed against someone of blood or step-relation to the offender. *See* William F. Enos, et al., *Forensic Evaluation of the Sexually Abused Child*, 78 PEDIATRICS 385 (1986).

[827] Fixated pedophiles have been "obsessed since early adolescence with the fantasy and reality of sex with children [and they] are particularly difficult to treat successfully." Freeman-Longo & Wall, *supra* note 772, at 58.

[828] *See* N.Y. CORRECT. LAW §168-a (McKinney 1996) (limiting pedophile categories to degrees of violence).

[829] The New York statute defines sex offenders in terms of convictions for, inter alia, rape, sodomy, sexual abuse and incest. *See* N. Y. CORRECT. LAW §168-a.1 - 2 (McKinney 1996).

[830] *See, e.g.*, Rhonda L. Rundle, *Medicine: Will 'Chemical Castration' Really Work?*, WALL ST. J., Sept. 19, 1996, at B1. "Researchers at the John Hopkins clinic report rates of repeat of between ten percent to fifteen percent in men who received [drug] treatments combined with 'talk' therapy. *Id.*

ROBERT FARLEY: It is a societal decision that we have to make. The statistics right now demonstrate that treatment does not work, and the recidivism rate is so high. Society, therefore, has to make a determination whether that risk is worth taking.[832] When a person is duly convicted in a court of law for being a sexual predator against a child, for raping that child, that person should go to jail for the rest of his or her life.

AUDIENCE MEMBER: Earlier in the conference today, it was mentioned that, with regard to Megan's Law in New York, there are different categories.

---

[831] *See, e.g.*, Stephanie N. Mehta, *Shrink Rap: Treating Sex Offenders Becomes an Industry, But Does It Work?*, WALL ST. J., May 24, 1996, at A1 (concluding that therapy has not proven effective, and reporting a 1993 Canadian study which found that "42% of imprisoned child molesters are later re-convicted for violent sexual crimes - whether they received therapy or not").

[832] Bedarf, *supra* note 190, at 893 (stating that "[l]egislatures, courts, and advocates all agree that sex offender registration statutes are intended to address the high recidivism rate of sex offenders").

ROBERT FARLEY: Not everyone who has to register under Megan's Law in New York is a pedophile.[833]

PATRICK REILLY: And we are not talking about everyone who is committed as a sexual offender being a pedophile, either.[834]

ROBERT FARLEY: That is correct.

AUDIENCE MEMBER: It sounds like you take everybody in the same scope. You do not want to acknowledge a difference?

ROBERT FARLEY: No. I think that what you have to look at is the type of crime committed and recidivism rates for those people. If you look at pedophilia, as Professor Brooks mentioned, it has a sky high rate of recidivism,[835] and children are being scarred for the rest of their lives.[836] We have to look at the victims here, too. And with respect to your question concerning the provision of services for victims, prevention is the only way to go here. You have to get these victims

---

[833] The New York statute requires that all sex offenders register, without regard to the age of the victim. *See* N.Y. CORRECT. LAW §168-a to f (McKinney 1996).

[834] *See* N.Y. CORRECT LAW §168-a.2 (McKinney 1996) (including rape, sodomy, sexual abuse, incest, unlawful imprisonment and kidnapping of individuals who are younger than seventeen years old in the definition of sex offenses).

[835] *See, e.g.*, Christopher Ringwald, *Task Force Proposed to Aid Sex Offenders Law*, TIMES UNION (Albany, NY), Aug. 20, 1996, at B8, *available in* 1996 WL 9554708. ("'[P]edophiles have the highest recidivism rate among criminals'. . . ." (quoting Marc Carey of the New York State Attorney General's Office)).

[836] *See, e.g.*, Mike Stanton, *Bearing Witness: Professor's Story of Remembered Abuse Strikes a Chord*, PROVIDENCE SUNDAY, June 4, 1995, at A1, *available in* 1995 WL 9245765 (stating that "shame and other emotions stemming from having been molested leave scars into adulthood, even among successful people").

early and treat them early so they do not become pedophiles.[837]

AUDIENCE MEMBER: Yes, to break the cycle. It is the only way.[838]

ERIC JANUS: I want to say one thing about treatment. There is one meta-study that I have read by Hall.[839] It looked at all of the treatment outcome studies[840] and found a small treatment effect.[841] In other words, he says that he does believe treatment can be effective,[842] however he says the effect is stronger with outpatient, voluntary patients, rather than with inpatient.[843]

AUDIENCE MEMBER: After-care, life-long after-care. A true

---

[837] *See, e.g., Morgan Man Sentenced to 220 Years for String of Sex Crimes Against Children*, COURIER (Louisville, KY), Feb. 12, 1989, at 4B, *available in* 1989 WL 3865663. "All research tells us that victims child sexual abuse are likely to become abusers themselves. . ." (quoting Morgan County, Kentucky prosecutor Jane S. Craney). *Id.*

[838] *See, e.g., Experts Say Child-to-Child Sexual Abuse Cases Increasing*, SAN ANTONIO LIGHT, June 3, 1991, at B3, *available in* 1991 WL 5012980. "If you have one originator who abuses ten people, and those ten people abuse ten people, then we're up to one hundred . . . " (quoting Jeanne Wilson, an investigator at the Texas Human Services Department). *Id.*

[839] Nagayama-Hall, *supra* note 793, at 802.

[840] The twelve recent studies which were analyzed "compared the recidivism of sexual offenders [of all varieties] who had completed a treatment program with sexual offenders who had completed a comparison treatment program or did not receive treatment." *Id.* Thirty-two other studies were rejected due to the small number of participants examined, and forty-eight were rejected for having no control group or for not reporting recidivism data. *Id.* at 803.

[841] *Id.* at 806. The analysis reveals that, of similarly situated sexual offenders, twenty-seven percent of those who were untreated and nineteen percent of those who were treated offended again. *Id.*

[842] *See generally id.*

[843] *Id.* at 807. "Among studies of institutionalized samples, there was a small effect size for treatment, whereas there was a medium effect size for treatment studies of outpatient samples." *Id.*

pedophile does not change the way he thinks.[844] Even if you put him on Depo-Provera,[845] he is still thinking about molesting children.[846] Often the criminals, the inmates, I found too, if they cannot get an erection, they use a Coke bottle or their fingers. It does not stop them from committing these crimes. It is compulsive behavior, which you do not cure.[847] You can only do behavior modification.[848]

ROBERT FARLEY: All you can do is control it.[849]

PATRICK REILLY: Well, that is what behavior modification is.[850]

AUDIENCE MEMBER: That is behavior modification. It is not

---

[844] *See* Deborah Churchman, *Is Child Abuse a Disease?; Making a Case for Treating Sex Offenders,* WASH. POST, Oct. 4, 1988 at 8, (citing Dr. Martin Malin, of the Johns Hopkins Sex Disorders Clinic, who avers that treatment teaches self-control, but pedophiles will always sexually desire children).

[845] Depo-Provera is an anti-androgen drug used to treat sex offenders who show extremely high levels of testosterone. *Id.* Its effect is to lower the sex drive to a level equivalent to a prepubescent stage. *Id.*

[846] *See* Daniel Goleman, *Therapies Offer Hope for Sex Offenders,* N.Y. TIMES, Apr. 14, 1992, at C1 (noting that studies have found that among many sexual offenders the sexual urge is independent of their hormonal levels; thus drugs such as Depo-Provera, which act which act upon testosterone levels, would have little effect in such cases).

[847] *See* Lurigio, et al., *supra* note 800, at 72. "Treatment is designed to control (but not cure) offenders' sexual aggressiveness and deviant behaviors." *Id.* "Offenders more amenable to treatment accept responsibility for their crimes, regard sex offending as a serious problem, and are motivated to stop their behaviors for the sake of future victims." *Id.*

[848] Behavior modification techniques, including "masturbatory satiation," reduce psychological arousal by converting the focus of sensitization. *Id.* at 73. The goal is to make offenders associate sexually deviant fantasies with aversive images in order to reduce the stimulus otherwise associated with sexually deviant images, and, thereby, to reduce the pedophile's arousal. *Id.*

[849] *But see generally id.* (discussing the various sex offender treatments, including cognitive-behavioral therapies, which do attempt to alter the offenders' attitudes and thoughts).

[850] *Id.*

changing the way they think, and that is what I am concerned about. Mr. Farley, how hard would it be to change the law to say pedophiles now have their own law?

ROBERT FARLEY: As far as what is concerned?

AUDIENCE MEMBER: As far as the sentences are concerned.

ROBERT FARLEY: We have submitted a bill to the legislature to do it.[851]

AUDIENCE MEMBER: On this topic, has anything been introduced regarding pedophiles being committed for life in New Jersey?

JANE GRALL: No, there has not.

AUDIENCE MEMBER: Is there a possibility there will be?

JANE GRALL: I do not think that is any more than a remote possibility.

PATRICK REILLY: Yes. Understand that the pedophile diagnosis which is being used is a clinical diagnosis of a particular type of person.[852] Not everyone that has taken advantage of a person under eighteen necessarily fits the clinical diagnosis of pedophilia.[853]

---

[851] A. 10991, 219th Gen. Assem., 2d Reg. Sess. (N.Y. 1996) (an act to amend the penal law adding Section 4 to N.Y. PENAL LAW §70.08, which provides for life sentences for sex offenders upon their second conviction).

[852] *See* Montana, *supra* note 180, at 604 n.6. "'[P]edophilia is a state in which an individual is pre-disposed to use children for his or her sexual gratification'. . ." (quoting DAVID FINKELHOR, A SOURCEBOOK ON CHILD SEXUAL ABUSE, 91 (1986). *Id. See also* accompanying text.

[853] *See, e.g.*, Lisa Anderson, *'Megan's Law' Draws Support, Raises Questions*, NEW ORLEANS TIMES-PICAYUNE., Aug. 21, 1994, at A36, *available in* 1994 WL 3587397 (discussing the case of a seventeen-year-old boy who was convicted for the statutory rape

AUDIENCE MEMBER: You advocate an alternative of life-long imprisonment. Do you acknowledge that a problem exists with the proportionality of that punishment to the crime, a problem which does not exist with other crimes?[854] Should this cause us to pause and reflect over whether this is just an emotional and timely issue that should not spur life sentences?[855]

ROBERT FARLEY: Well, we do not believe that is so. We think that the severity of the crime justifies a life imprisonment term. There are two things that you look at in punishment. That is why we believe that the appropriate remedy is through the judicial system: going through a court of law, where the defendant has prescribed rights under both the federal and the state Constitution,[856] where he can raise these other issues to mitigate whether he should be convicted and given a life sentence.[857] That is one issue. The other stems from the severity of a crime. When you have a sexual predator go after a child and commit that heinous crime, that act deserves life imprisonment.[858]

---

of a sixteen-year-old girl and made subject to Louisiana's notification law).

[854] *See generally*, Steven Grossman, *Proportionality in Non-Capital Sentencing: The Supreme Court's Tortured Approach to Cruel and Unusual Punishment*, 84 KY. L.J. 107 (1995-1996) (examining the Supreme Court's treatment of claims of excessive prison sentences and recommending a standard of punishment under the Eighth Amendment).

[855] *See, e.g.*, Campbell, *supra* note 389, at 521-22. "Currently there is a national outcry over [sexual crimes against children]." *Id.* at 563 n.12. "'Child molesters merit the ultimate punishment and rehabilitation is a pathetic joke.'" (quoting New Jersey resident, Marion Sauter). *Id.*

[856] *See generally* Louis D. Bilionis, *Criminal Law: Moral Appropriateness, Capital Punishment, and the Lockett Doctrine*, 82 J. CRIM. L. 283 (1991) (discussing the invocable rights of defendants who are faced with life sentences).

[857] *Id.*

[858] *But see generally* Fred S. Berlin, *The Paraphilias and Depo-Provera: Some Medical, Ethical and Legal Considerations*, 17 BULL. AM. ACAD. PSYCH.& L. 233, 234 (1989) (analyzing pedophilia as a psychiatric disorder).

JOHN J. GIBBONS: I do not think it is that simple. The Supreme Court has held that it violates the Eighth Amendment to execute somebody for rape.[859] Rape is a pretty serious crime, too. I think that your proposed legislation poses very serious Eighth Amendment problems.[860]

ROBERT FARLEY: I do not believe that our society can justify not providing life imprisonment sentences.[861] When you talk about execution, there certainly are constitutional issues which arise, but those do not come into play with life imprisonment.[862] Furthermore, the convicted individual always retains the opportunity, as long as he or she is alive, to overturn that sentence.[863]

AUDIENCE MEMBER: I work with not only the offenders, but also many, many victims. Most of the offenders, almost all of them, were victims themselves.[864] They would rather have been dead than to live

---

[859] *See* Coker v. Georgia, 433 U.S. 584, 592 (1977) (holding that "a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment").

[860] *See* Grossman, *supra* note 854, at 193 (noting that although the Supreme Court grants deference to state sentencing guidelines, Eighth Amendment analysis includes a proportionality test which measures the severity of the crime against the sentence imposed). *But see* Katherine P. Blakely, *The Indefinite Civil Commitment of Dangerous Sex Offenders is an Appropriate Legal Compromise Between "Mad" and "Bad" - - A Study of Minnesota's Sexual Psychopathic Personality Statute*, 10 NOTRE DAME J. L. ETHICS & PUB. POL'Y 227, 271 (1996) (stating that "any punishment short of death for any serious crime will likely not violate the Eighth Amendment prohibition against cruel and unusual punishment").

[861] *See id.* at 270 (advocating life sentences for sexual predators because they are dangerous and likely to re-offend).

[862] *See id.* at 271 (maintaining that only the death penalty is likely to raise Eighth Amendment issues).

[863] *See, e.g.*, N.Y. CIV. PRAC. L. & R. §5501-25 (McKinney 1996) (explaining New York State's procedure for appeal, and, if successful, overturning of a conviction).

[864] *See* Alice Park, *Why Do They Do Those Horrible Things?*, TIME, Sept. 2, 1996, at 25 (stating that pedophilia may have its roots in childhood sexual trauma); *see also* Freeman-Longo and Wall *supra* note 772, at 58-59 (claiming that over half of all sex offenders progress from "victim to victimizer").

through what they had to live through after their sexual traumas. So, Judge, I am sorry, I do not agree with you. I think that the victims of sex crimes have been given life sentences that you can never appeal.[865]

JOHN J. GIBBONS: Certainly the victims evoke a great deal of our sympathy. But we are talking about the relationship between the State and the person who is being incarcerated.[866]

AUDIENCE MEMBER: I wonder how Mr. Farley would respond to a suggestion that his proposal criminalizes the status of being a pedophile, instead of the behavior.[867]

ROBERT FARLEY: It does not criminalize the status of being a pedophile.[868] What it does do is provide for a life sentence for those who conduct certain acts, such as raping a child.[869] If you do that, and you

---

[865] *See* Cheryl Wetzstein, *Texas Child Molester's Case Reignites Decades-Old Debate; 'First Responsibility. . . is to Protect Our Children,'* WASH. TIMES, Apr. 17, 1996, at A2 (opining that pedophiles should be given life sentences because the children they molest must live with the ordeal of their sexual molestation for their entire lives).

[866] *See generally* James W. Ellis, *Limits on the State's Power to Confine "Dangerous" Persons: Constitutional Implications of* Foucha v. Louisiana, 15 U. PUGET SOUND L. REV. 635 (discussing a state's leeway and limitations in depriving individuals of their physical liberty).

[867] The Supreme Court has held that the criminalization of status is cruel and unusual punishment. *See* Robinson v. California, 370 U.S. 660 (1962) (striking down a California statute which imposed criminal sanctions on individuals who are, inter alia, addicted to illegal drugs).

[868] *But see* Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENTARY 257, 282 (1996) (arguing that sex offender registration statutes, by subjecting a single class of persons to public disclosure, signal to the public that "members of this class are so despicable that reasonable people should do everything they can to avoid them," and that "once a person has joined the class. . . his status becomes permanent").

[869] *See, e.g.*, A. 10991, 219th Gen. Assem., 2d Reg. Sess. (N.Y. 1996) (an act to amend the penal law adding Section 4 to N.Y. PENAL LAW §70.08, which provides for life sentences for sex offenders upon their second conviction).

are over a certain age,[870] you will be sentenced accordingly. This is not statutory rape.[871] Every day we criminalize certain types of conduct.[872] What we are aiming at here is the conduct, not the person.[873] That person is sick, but we have to get rid of that type of conduct.

AUDIENCE MEMBER: Your proposal is informed by the high rate of recidivism in many cases.[874]

ROBERT FARLEY: Absolutely.

AUDIENCE MEMBER: Which indicates that it is not just the act of punishing. It is the possibility that the act will be repeated.

ROBERT FARLEY: Absolutely. But when we deliver punishment in our society, however it is delivered, for the crime of murder, for the crime of rape, or for any other crime, there are two things that you look at. The first is the severity of the crime and the actual punishment that

---

[870] S. 6491, 219th Gen. Assem., 2d Reg. Sess. (N.Y. 1996) (defining a pedophilic offense as one committed by someone over the age of twenty-one).

[871] In New York, a person over the age of twenty-one can be charged with third degree rape if the individual has intercourse with someone to whom he or she is not married, and who is less than seventeen-years old. N.Y. PENAL LAW §130.25(2) (McKinney 1996). Second degree rape may be charged if the perpetrator is eighteen-years-old or more, and the other person is less than fourteen-years-old. *Id.* at §130.30. First degree rape is charged to any male, regardless of his age, who engages in sexual intercourse with a person who is less than eleven-years-old. *Id.* at §130.35(3).

[872] *See* N.Y. PENAL LAW §10.00(1) (McKinney 1996) (defining the term "offense" as it appears throughout the New York Penal Law as "conduct" subject to state-imposed punishment).

[873] *Id.*

[874] Jon R. Sorensen, *Vacco Seeks Crackdown on Pedophiles Proposes Legislation to Prohibit Bail, Create Life-Without-Parole Option*, BUFFALO NEWS, Aug. 9, 1995, *available in* 1995 WL 5494011 (quoting Attorney General Dennis C. Vacco of New York who believes that pedophiles's recidivism justifies the imposition of life sentences).

you are going to impose for that level of severity.[875] Second is the harm to society and the need to keep that person away from society to reflect upon the crime.[876] Both of those considerations are driving both of these laws.

PATRICK REILLY: With regard to commitment, there is one more question. We have now expanded the definition from psychosis[877]—which was somewhat like an unwritten definition that most of the psychiatrists used around the country—to include other types of mental illnesses beyond psychosis.[878] How broadly can we go? For instance, in Russia years ago, they defined mental illness as disagreeing with the governor, disagreeing with the government.[879] Can we simply describe any behavior as illness, and then, if a person is deemed dangerous, put him or her in a psychiatric hospital?

ERIC JANUS: Yes, I think we can.

---

[875] *See generally* NIGEL WALKER, WHY PUNISH? 1 (1991) (discussing the reasons for, and means of, societal institutionalization of punishment).

[876] *Id.*

[877] *See* DSM-IV, *supra* note 606, at 455-57 (distinguishing among the varieties of psychosis); *see also* BLACK'S LAW DICTIONARY 1227 (6th ed. 1990) (defining psychosis as, inter alia, "a severe mental disorder in which the patient departs from the normal pattern of thinking, feeling and acting").

[878] *See, e.g.*, Claudine M. Leone, Comment, *New Jersey Assembly Bill 155 - A Bill Allowing the Civil Commitment of Violent Sex Offenders After the Completion of a Criminal Sentence*, 18 SETON HALL LEGIS. J. 890, 896-97 (1994) (stating that under the bill being discussed, an individual need only be deemed dangerous, and need not be diagnosed as psychotic, to be committed); Crimaldi, *supra* note 434, at 203 (referring to the Supreme Court's validation of the Minnesota commitment statute in *In re* Blodget, 510 N.W.2d. 910, the author states "[t]he Court seems willing to allow the states to define mental illness in terms of compulsive behavior, rather than limiting the definition to psychosis").

[879] *See generally* Ryan Goodman, Note, *The Incorporation of International Human Rights Standards into Sexual Orientation Asylum Claims: Cases of Involuntary "Medical" Intervention*, 105 YALE L. J. 255 (discussing, inter alia, various international and historical definitions of psychiatric disorders).

PATRICK REILLY: Constitutionally?

ERIC JANUS: Well, I think that, given the way these courts have been looking at it to date, there has been absolutely no critical inquiry into what it takes to be mentally ill. If the doctors said that repetitive bank robbery was an illness, that would be an illness. That appears to be how the principles go right now. Now, in actual fact, it may be that sex occupies a special status in our society, and that so-called sexual deviancy is more likely to be called illness than greed, for instance. But the principles, at least in my judgment, would support a real broadening of civil commitment.[880]

PATRICK REILLY: And that would be constitutional?

ERIC JANUS: Although I think the courts are wrong, so far it appears that it would be.

PATRICK REILLY: Alex, I am sure you have a response.

ALEXANDER BROOKS: I believe that the statute in Washington employs the term "mental illness."[881] It is based on diagnoses that are, in effect, certified by the American Psychiatric Association, and I think that that creates an extremely important limiting effect.[882] However, I

---

[880] *See, e.g.*, Michael L. Perlin, *The ADA and Persons with Mental Disabilities: Can Sanist Attitudes Be Undone?*, 8 J. L. & HEALTH, 15, 38 (1993-1994) (noting, with regard to civil commitment statutes in general, that "[a] pendulum swing has resulted in a call for *expanded* commitment powers in many jurisdictions") (emphasis in original).

[881] WASH. REV. CODE ANN. §71.09.020 (West Supp. 1995). Under this statute, entitled Sexually Violent Predators, "'[m]ental abnormality' means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others." *Id.*

[882] *But see In re* Hendricks, 912 P. 2d 129, 135 (Kan. 1996). In its discussion of Personal Restraints of Young, 857 P.2d 989 (Wash. 1993), the Kansas Court criticized the Washington Supreme Court's "selective and inconsistent use" of the American Psychiatric

can envision comparable mental conditions that have not yet been incorporated into the *Diagnostic and Statistical Manual of Mental Disorders* (which the American Psychiatric Association publishes) as possibly serving as a basis for mental illness.[883] What you are asking about is the kind of slippery slope argument that is familiar to all law students. If we are going to do this, are we next going to do that, and are we next going to do the other? I reject that approach because I am convinced that the courts will not permit us to go beyond a certain point. If, however, they do permit it, they will have considered it very, very profoundly and will have decided that it is an appropriate point to go to.

PATRICK REILLY: What sets the point? The Constitution? Common law?

ALEXANDER BROOKS: Well, obviously, the Constitution is one of the basic protections, so the Constitution will certainly be invoked if we go too far.[884] If we go beyond the boundaries of, as Professor Janus refers to it, common sense.[885] I think the Constitution is the main protection that we have against going too far.

PATRICK REILLY: I want to get back to community notification for a while. Opponents of community notification argue that it would be equated with an unacceptable degree of vigilantism.[886] There have been

---

Association's definitions of mental illness, stating "mental illness means whatever the Washington Court says it means." *Id.*

[883] *See, e.g., id.*

[884] *See, e.g.*, Jones v. U.S., 463 U.S. 354, 361 (1993) (stating that "commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection . . . [therefore,] a state must have a constitutionally adequate purpose for the confinement").

[885] *Id.*

[886] *See* Feldman, *supra* note 238, at 2. "Opponents of the notification laws regularly cite examples of vigilantism to support their claim that the law's impact is mostly bad." *Id.*

a number incidents of vigilantism in New Jersey.[887] Do you agree that vigilantism and harassment are likely to occur? And are there ways in which this consequence can be eliminated or significantly lessened? What should we do about vigilantism if it is occurring, or to deter it from happening?

JOHN J. GIBBONS: I think vigilantism is irrelevant to the problem,[888] although it happens. Houses were burned down in the State of Washington.[889] People were assaulted in the State of New Jersey.[890] But the very purpose of the community notification statute is social ostracism.[891]

JANE GRALL: I was hoping that we would clear up the issue of social ostracism and harassment today, whereas I think it has gotten muddier. The Supreme Court of the United States has said that such results are permissible, and are not violations of the Ex Post Facto Clause.[892] For

---

[887] *See, e.g.*, Gerry DeMarco, *Innocent Man Beaten, Mistaken for Sex Offender*, THE RECORD (New Jersey), Jan. 11, 1995, at A1 (reporting the first known vigilante attack against a man who was mistaken for the registered offender the attackers sought).

[888] *But see id.*; Sabin, *supra* note 425, at 351 (enumerating several incidents of vigilantism and harassment directed toward actual or suspected sex offenders).

[889] In 1993, a child molester's Lynwood, Washington house was burned after authorities announced his imminent jail release. Kim Murphy, *'Tip Sheets' Try to Ferret Out Fugitives; Local Tabloids Pick Up Where America's Most Wanted Left Off, Featuring Crime Suspects and Missing Children. Critics Fear Vigilantism*, LOS ANGELES TIMES, Mar. 19, 1996, *available in* 1996 WL 5251875.

[890] *See* DeMarco, *supra* note 887.

[891] *See, e.g.*, Note, *Prevention Versus Punishment: Toward Principled Distinction In The Restraint of Released Sex Offenders*, 109 HARV. L. REV. 1711, 1714 (1996). "Community notification subjects ex-convicts to stigmatism and ostracism, and puts them at the mercy of a public that is outraged by sex crimes." *Id. But see* Goodman, *supra* note 6, at 798 (noting that the purpose of Megan's Law is to protect society, not to subject sex offenders to harassment or vigilantism).

[892] *See* Collins v. Youngblood, 497 U.S. 37, 41 (1990). "Although the Latin phrase '*ex post facto*' literally encompasses any law passed 'after the fact,' it has long been recognized by this Court that the constitutional prohibition on *ex post facto* laws applies only

instance, it is not punishment to take away a person's medical license on the basis of a conviction,[893] or to preclude a person, after a conviction, from participating in a labor union as an officer;[894] or to prohibit people from possessing firearms on the basis of prior convictions.[895] Those prohibitions, I believe, comprise legal ostracism, legal disability. The community notification law does none of those things. It gives out information about a person's criminal conviction, information that anybody has access to.[896] Now, in New Jersey, we do give out additional information. We give not only the fact of conviction, but also a prediction of dangerousness.[897] That is where the additional protection comes in; but that is not punishment.[898]

Even assuming it were construed as punishment, I am still not

---

to penal statutes which disadvantage the offender affected by them." *Id.*

[893] *See* DeBlanco v. Ohio State Medical Board, 604 N.E.2d 212 (Ohio Ct. App. 1992) (holding that the State Medical Board of Ohio did not abuse its discretion in ordering permanent revocation of a doctor's medical license after she was convicted of a felony).

[894] *See* De Veau v. Braisted, 363 U.S. 144 (1960). The Court upheld a New York law which prohibited collecting union dues from an officer or agent of the union who was convicted of a felony because it was viewed as a state regulation and not a punishment. *Id.*

[895] Any person who is convicted of a crime punishable by imprisonment of more than one year may not possess any firearm or ammunition in a manner affecting commerce. 18 U.S.C.A. §922(g)(1)(West 1996). What constitutes a crime punishable by imprisonment of more than one year is determined by the laws of the jurisdiction prosecuting the offense. 18 U.S.C.A. § 921(a)(20) (West 1996). Under a regulatory purpose analysis of these two statutes, state laws which prohibit possession of firearms for a defined period following a conviction do not violate the Ex Post Facto Clause. *See* United States v. Collins, 61 F.3d 1379 (9th Cir. 1995).

[896] N.J. STAT. ANN. §47:1A-1 (West 1989) (providing that as a matter of public policy "public records shall be readily accessible for examination by the citizens of this State, with certain exceptions . . .").

[897] N.J. STAT. ANN. § 2C:7-8.b (West 1995) (listing relevant factors to be considered in determining the "risk of re-offense," including conditions of release, the offender's age, criminal history, psychological or psychiatric profiles and recent behavior).

[898] The New Jersey Supreme Court has upheld that state's sex-offender registration law, stating that it is not punitive, but rather it is a purely regulatory law aimed at protecting the community from the evils of sexual crimes. *See* Doe v. Poritz, 662 A.2d 367, 404 (N.J. 1995).

sure that this would violate clear precedents regarding what a state is permitted to do on the basis of a conviction, and regarding a law that applies retroactively to that conviction.[899] If this is held to be punishment, there are going to be quite a number of Supreme Court cases which will subsequently be overturned.[900]

AUDIENCE MEMBER: I also want to touch on the issue of social ostracism in terms of notification. Mr. Farley says that there is a ninety percent recidivism for these people, so we are talking about a group of people who are extremely dangerous to society. We require people to register guns because we want to know who has them and how many there are out there.[901] Here, we are talking about a dangerous group of people, and we, as the public, have just as much a right to know about that as we do about of those other dangers. So I do not think it ostracizes anybody. I think it serves the useful purpose of notifying the public. We have a right to know who it is we are living next door to, so that we can guard against them.[902] If it ostracizes in the process, that is an unfortunate by-product, but the overall purpose is to give us that useful information.

---

[899] *See, e.g.*, Collins v. Youngblood, 497 U.S. 37, 52 (1990). "A law does not become punitive simply because its impact, in part, may be punitive unless the only explanation for that impact is a punitive purpose: an intent to punish." *Id.*

[900] While the Supreme Court has not yet ruled on any of the recently passed state sex offender statutes (arguments were heard on December 10, 1996 for the civil commitment portion of the Kansas Sexually Violent Predator Act (KAN. STAT. ANN. §59-29(9)(02) (1996)), habitual offender statutes, which allow increased punishment on the basis of prior crimes, have been upheld and are unlikely to be affected. *See* Marcia Coyle, *Swing Votes Inject Suspense Into New Terms*, NAT'L L.J., Oct. 7, 1996, at A1. *See, e.g.*, Parke v. Raley, 506 U.S. 20, 28 (1992) (upholding the use of prior convictions under a Kentucky habitual offender statute).

[901] *See* 46 U.S.C.A. §814 (West 1989) (providing for the creation of the National Firearms Registration and Transfer Record).

[902] New Jersey Congressman Dick Zimmer expressed this same sentiment when he introduced the Federal version of Megan's Law (U.S.C.A. §14017 (West Supp. 1996)) into the House of Representatives. *See* Adam Piore, *House OK's Federal Version of Megan's Law*, THE RECORD (New Jersey), May 8, 1996, at A18.

JOHN J. GIBBONS: Well, the logical conclusion of your position would be that we impose that same sort of obligation on all of us. All of us give genetic markers to the police. All of us report our intention to move. All of us have private information about us readily available. It would give the opportunity to avoid people you do not like, people of certain nationalities, for example. Is that the kind of society you want to live in? And if you are going to restrict it only to people who have been convicted, then you must answer the question, does it inflict punishment?[903]

AUDIENCE MEMBER: When it comes to balancing the interests of an innocent school child walking home from school against the interests of a convicted pedophile, who carries with him a ninety percent chance of recidivism, it seems to be an obvious choice to me that the state has a strong interest in protecting that school child,[904] and a contrary conclusion is difficult for me to accept.

JOHN J. GIBBONS: Well, your objection is to the Constitution because when punishment is the issue, the Constitution does not permit balance in favor of punishing a person twice for the same crime.[905]

---

[903] The equating of notification laws with punishment has been significant in *ex post facto* and double jeopardy arguments against the constitutionality of Megan's Law. *See, e.g.*, Doe v. Poritz, 662 A.2d. 361 (N.J. 1995) (holding that Megan's Law passes constitutional muster since any perceived punishment it imposes is merely a by-product of its purely regulatory function).

[904] *See* Doe v. Poritz, 662 A.2d at 412. "We find that the state interest in protecting the public is legitimate and substantial. . . . We find, more importantly, that the interest in disclosure substantially outweighs the interest in nondisclosure." *Id.*

[905] "[N]or shall any person be subject for the same offence be twice put in jeopardy of life or limb." U.S. CONST. amend. V; *see also* Kenneth G. Schuler, *Continuing Criminal Enterprise, and the Multiple Punishment Doctrine*, 91 MICH. L. REV. 2220, 2222 (1993). "The notion that no person should be subject to criminal prosecution or punishment twice for the same offense is perhaps the oldest and most widely recognized guarantee in the Bill of Rights." *Id.*

ROBERT FARLEY: But to say that it is punishment is to accept a pejorative viewpoint that this is intended as social ostracism. I can tell you that this statute was not intended as social ostracism.[906] The intention is to notify the public that these individuals have been released and are out in the community.[907] The effect may be ostracism, but they are ostracized because of the crime they committed, not because of the notification.[908] All that notification does is provide people with the knowledge that these individuals are being released. If they were present in the courtroom when this person was sentenced, or if they were there when he walked out of the prison door, they would know that. But in this modern society, we are too big. We do not know these things. This law provides us with an opportunity not to act like ostriches and say if we do not know it, it will be okay. It provides us with an opportunity to protect our children.

JANE GRALL: A tremendous amount of this information is readily accessible to the public anyway, as was proven by the events in the two cases where people brought the challenges to the law.[909] The newspapers had access to information about the individuals, the

---

[906] N.Y. CORRECT. LAW §168 (McKinney 1996).

[907] New York's version of Megan's Law has three levels of notification. N.Y. CORRECT. LAW §168-l. At the lowest level, only law enforcement agencies are notified about an offender's release. *Id.* at §168-l(6)(a). The middle level authorizes those agencies to release relevant information to the public, including the offender's approximate address and photograph. *Id.* at §168-l(6)(b). The highest notification level allows discretionary release of a wide array of information, including the offender's exact address. *Id.* at §168-l(6)(c). In addition, that information is collected in a directory which is publicly available. *Id.*

[908] *See* Doe v. Poritz, 662 A.2d. 367,405 (N.J. 1995). "The fact that some deterrent punitive impact may result does not . . . transform [Megan's Law] into 'punishment' if that impact is an inevitable consequence of the regulatory provision." *Id.*

[909] *See* Diaz v. Whitman, No. 94, slip op. (D. N.J. Jan. 3, 1995); Artway v. Attorney General, 876 F. Supp. 666, 692 (D. N.J. 1995), *aff'd in part and vacated in part*, 81 F.3d 1235 (3d Cir. 1996).

convictions, the court records, and the transcripts of the trial.[910] The press can and did get detailed information which was readily available about Mr. Diaz[911] and Mr. Artway.[912] Not from the state, but because it is out there in the public realm. In Mr Artway's case, the information could be garnered from the published opinions of the Third Circuit Court of Appeals,[913] obviously readily accessible information. To call dissemination of information punishment is ludicrous in this age where information is so readily available.

JOHN J. GIBBONS: If the information is out there, then the only purpose for having Artway come in every ninety days and make his ceremonial kowtow to the police[914] is to remind him of what he has done. Reminding him as specific deterrence, and deterrence is punishment.[915]

---

[910] New Jersey law enforcement agencies may disclose any information about the registrants under the Sexual Offender Registration Act so long as it is deemed "relevant and . . . necessary for public protection." N.J. REV. STAT. ANN. §2C:7-5(a) (West 1995).

[911] Significant press coverage accompanied Carlos Diaz's release from prison on January 1, 1995. *See, e.g.*, Michelle Ruess, *Rapist Will Challenge Megan's Law; Seeks to Block Public Notification*, THE RECORD (New Jersey), Dec. 31, 1994, at A1; Robert Hanley, *Judge Curbs Law on Sex Offenders*, N.Y. TIMES, Jan. 4, 1995, at A1; Christopher Kilbourne, *Backers Vow Fight to Save Megan's Law*, THE RECORD (New Jersey), Jan. 5, 1995, at A3.

[912] Alexander Artway brought a civil rights action against the state of New Jersey after he was convicted of sodomy in 1971 and made subject to New Jersey's Sexual Offender Registration Act (N.J. STAT. ANN. §2C:7 (West 1995)) which was enacted two years after his release from prison in 1992. Artway v. Attorney General, 876 F. Supp. 666 (D. N.J. 1995), *aff'd in part and vacated in part*, 81 F.3d 1235 (3d Cir. 1996). For a discussion of Mr. Artway's background and challenge, *see generally* Maureen Castellano, *Judged Acceptable, Barely*, N.J.L.J.., Feb. 13, 1995, at 20.

[913] *Id.*

[914] In New Jersey, convicted sex offenders who are released from incarceration must report their whereabouts to law enforcement agencies every ninety days. N.J. REV. STAT. ANN. §2C:7-2(4)(e) (West 1995).

[915] *See Prevention Versus Punishment, supra* note 891, at 1716 (stating that deterrence is considered to serve one of the utilitarian purposes of punishment).

RONALD K. CHEN: I would like to interject, first, with a few factual observations. Recall that the information that is disseminated, at least in New Jersey's version of the law, is not confined to the fact of conviction.[916] What is additionally reported is the individual's present address, place of schooling, if relevant, place of work, and vehicle license plate information.[917] As a practical matter, if we are worried about vigilantism and harassment, the release of this information is going to be of much greater concern. If this were simply a question of balancing, we are in a tug-of-war between the interests of the public and the interests of sex offenders. None of us are under any illusions as to how that could come out. Yet, as Professor Gibbons said, there are certain constitutional provisions that are simply absolutes. After all, why are we asking this question about what is punishment? It is not necessarily over, on balance, whose rights are of greater weight, but whether a legislature can do a very particular thing: pass a retroactive law. I disagree that calling something punishment is necessarily pejorative. Governments impose punishment all the time, and usually, in the appropriate circumstance. All of us say that is an absolutely appropriate thing to do.[918] You are avoiding the truth by saying because punitive matters are considered to be negative, that you did not intend punitive effects. Governments punish all the time validly. They just cannot do it with two bites of the apple.[919]

AUDIENCE MEMBER: [What about the social ostracization imputed to a family, when, for example, their child steals from a gas station] now, are we going to change the laws and make his family's ostracism

---

[916] *See* N.J. REV. STAT. ANN. §2C:7-4(b)(1) - (3) (West 1995).

[917] *Id.*

[918] *See, e.g.*, Judge Erwin Fleet, Commentary, *Sentencing the Criminal - A Judicial Responsibility*, 9 AM. J. TRIAL ADVOC. 339, 369 (1986). "Criminal laws represent society's expressions, speaking through its elected representatives, as to that conduct which is socially unacceptable and therefore prohibited on pain of punishment." *Id.*

[919] "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb ...." U.S. CONST. amend.V.

part of his punishment?[920] When somebody, some politician for instance, does something and they are disgraced, suddenly social ostracism becomes part of the punishment. I think you have to be across the board on this.

JOHN J. GIBBONS: Yes, across the board. That is what the Constitution says.[921] If he is ostracized because he was convicted of robbing a gas station, yes, that is punishment.

AUDIENCE MEMBER: But that is not the point of punishment.[922]

JOHN J. GIBBONS: But not twice.

AUDIENCE MEMBER: Are you saying that a court is punishing a sex offender by virtue of the fact that they will be socially ostracized.

PATRICK REILLY: I believe the Judge is saying that it is an additional punishment.

JOHN J. GIBBONS: By virtue of being classified as posing a high risk of re-offending. That classification is a punishment.[923]

---

[920] *See* Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1938 (1991) (noting the negative impact of shame and punishment on the convicted person's family, called the "spillover effect," when the offense is widely publicized or sensationalized).

[921] "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or
limb. . . ." U.S. CONST. amend.V.

[922] *But see* Massaro, *supra* note 920, at 1886 (stating that the shaming sanctions are "explicitly designed to make a public spectacle of the offender's conviction and punishment, and to trigger a negative, downward change in the offender's self-concept" and that "embarrassment is the principal purpose of punishment").

[923] *See, e.g.*, United States v. Halper, 490 U.S. 435, 448 (1989) (holding that a fine of $130,000 for false medical claims totalling $535 was punitive despite remedial label of statute).

PATRICK REILLY: And the Constitution is clear that you cannot add to the punishment.[924] The only question is whether this is punishment.

AUDIENCE MEMBER: You cannot change society. The Court is supposed to be above all of this bickering that we do.[925]

JOHN J. GIBBONS: But not above the Constitution.

PATRICK REILLY: That is right. The issue is, does this violate the Constitution? If it does, whether you believe it is a morally appropriate or inappropriate measure, we have to live with it being unconstitutional.

DANIEL FELDMAN: I think that is an appropriate way to frame the issue, but our viewpoint is very clear, at least with regard to New York's statute. In New York, our viewpoint is that his is not punishment—it is

---

> [T]he determination of whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve. Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment. *Id.*

[924] *See* U.S. CONST., amend. 5.

[925] Justice John Marshall stated, "[i]t is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). However, in 1840 the political philosopher Alexis de Tocqueville observed that the Supreme Court did far more than merely interpret the law, noting that the Justices "must be statesmen, wise to discern the signs of the times, not afraid to brave the obstacles that can be subdued, nor slow to turn away from the current when it threatens to sweep them off . . . ." 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 152 (Phillips Bradley et al., eds., Alfred A. Knopf 1946) (1840).

simply notification. It is dissemination of information.[926] The people who say that individuals affected by this law are ostracized as a result of being classified are the very same people who were arguing that the reason the original New Jersey statute was not constitutional was because it did not classify them.

Your comments were right on point. First, essentially, the material that our Megan's Law in New York makes available is information that is, in principle and in theory, already accessible. Accessible, that is, to anyone who puts a tremendous amount of time and effort into digging the material out.[927] So from a threshold constitutional, legal, and philosophical point of view, the law passes muster.[928] The law does not actually add to the public's right to get information because it could get that information now; therefore any ostracism that ensues is a result of the conviction for the initial crime. Those criminal records are a matter of public record.[929]

---

[926] Bill Alden, *Rochester Judge Rejects Challenge to 'Megan's Law,'* N.Y.L.J., Aug. 20, 1996, at 1 (noting that a Rochester judge rejected arguments that the statute imposes an additional punishment). *But see* Brian Jenkins, *ACLU Questions Constitutionality of Megan's Law*, CNN News, May 17, 1996 (quoting Loren Siegal of the ACLU as saying that "notification is punishment . . . if they've already served their time in prison, the notification is a second punishment").

[927] *But see* United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 763, 764 (1989) (holding that a compilation of information from government documents that are readily available to the public nonetheless tips the balance against disclosure when the privacy interest of an individual citizen is at stake).

[928] *Id.*

[929] *But see* Artway v. Attorney Gen., 876 F. Supp. 666, 668 (D. N.J. 1995).

> The registration and public notification provisions of Megan's Law provide public dissemination . . . of a convicted sex offender's name, likeness, place of residence, place of employment, a description and identification of his motor vehicle, as well as that information already available in the public record. Therefore Megan's Law goes well beyond all previous provisions for public access to an individual's criminal history. *Id.*

For a discussion of the recent cases concerning sex offender registration laws, *see* Claire M. Kimball, Note & Comment, *A Modern Day Arthur Dimmesdale: Public Notification When Sex Offenders Are Released Into the Community*, 12 GA. ST. L. REV. 1187, 1214-15 (1996).

However, there is the following footnote. There is the Supreme Court holding in *Reporters Committee*,[930] which, although it does not address the New York law, it does address what some people feel is an analogous issue, that by making a practical change so that information is more readily accessible you are, in fact, changing the constitutional balance.[931] Now, I believe that opinion may be confined to its facts, and that it is not relevant here. Nevertheless, one could argue that simply because we have taken information which is already theoretically accessible and rendered it practically accessible, we have changed the constitutional balance.[932]

Now, take all that and put it in the context of state-imposed punishment. A state obviously has a right to impose punishment at its first bite of the apple. The constitutional question which arises with this kind of law is based on the *ex post facto* prohibition, but that is not a simple issue.[933] You understand that virtually no state legislature is going to enact a notification statute and state that it is only to be applied to people who are convicted after it is enacted. The public would say, what, are you crazy? How about all those convicted sex offenders who are out there now, aren't you going to protect us against them? So virtually every notification statute is retrospective in that it applies to people who were convicted already. Thus, the question arises: is this *ex post facto* punishment?[934]

Now, here is the way the constitutional analysis of that question takes place. Generally, it is not enough for a legislature to say it did not

---

[930] United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989).

[931] *Id.* at 763-64.

[932] *Id.*

[933] *See, e.g.*, State v. Ward, 869 P.2d 1062, 1074 (Wash. 1994) (rejecting a contention that notification constitutes punishment under the Ex Post Facto Clause).

[934] *See* Artway v. Attorney Gen. of N.J., 876 F. Supp. 666, 692 (D. N.J. 1995) (holding that the notification aspects of Megan's Law violated the constitutional prohibition against *ex post facto* laws), *aff'd in part and vacated in part*, 81 F.3d 1235 (3d Cir. 1996) (holding that the challenge to the notification aspects of Megan's Law were not ripe).

intend it to be punishment, that it intended it to be something to safeguard the public.[935] The effect, as well as the intent, have to be predominantly what they call regulatory, which means safeguarding, not punishing.[936] How do you judge that? Do you judge it by the fact that there is some harassment, some vigilante behavior? Incidentally, at one point in this discussion, I meant to credit Professor Brooks. Professor Brooks has written, I think quite accurately, that while one can predict that there will be some vigilante activity, one can also reduce it, minimize it, mitigate it, through some legislative approaches.[937] In any case, we have attempted to do that in the New York statute.[938]

Let me return to the main thrust of this discussion. Does the fact that some negative things happen mean that the law punishes people in a constitutionally violative way simply because they occur after those

---

[935] In 1963, the Supreme Court established what are now referred to as the "*Kennedy*" factors which are to be considered when determining if a statute is penal or regulatory in character. *See* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963). These factors include:

> [w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as punishment, whether it comes into play only on finding scienter, whether its operation will promote the traditional aims of punishment - retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable to it, and whether it appears excessive in relation to the alternative purpose assigned. *Id.*

[936] *Id.*

[937] *See, e.g.*, Doe v. Poritz, 662 A.2d 367, 409 (N.J. 1995). There will be "'strong emphasis on providing . . . advice concerning consequences of vigilante activity" and that "law enforcement will investigate all allegations of criminal conduct by any person against the offender . . . and will criminally prosecute where appropriate'" (quoting ATTORNEY GENERAL OF THE STATE OF NEW JERSEY, GUIDELINE VI, METHODS OF COMMUNITY NOTIFICATION). *Id.*

[938] *See, e.g.*, People v. Ross, 646 N.Y.S.2d 249 (N.Y. Sup. Ct. 1996) (stating that "the legislative debate centered on safety risks to children if community notification was not enacted, and concerns of vigilantism by opponents of the legislation").

individuals have already been convicted and, presumably punished?[939] Our answer is no because the constitutional analysis asks whether the burden you place on offenders is greater than that which is necessary to provide societal protection.[940] For example, if you are notifying everyone under the sun, whether they are in any danger whatsoever, or whether there is any conceivable danger, you may be engaging in more notification than necessary to achieve even the optimum safety result. But if the notification provision is limited within reason to apply only so far as is necessary to achieve the optimal safety result,[941] then any incidental burden on the offender is not punishment.[942] The courts do not require perfection.[943] There are also other cases where the courts have held that if it is an additional burden on the offender, but that burden is merely incidental to a legitimate public interest, in this case, a public safety interest, that is not a violation of the *ex post facto*

---

[939] *See,* Goodman, *supra* note 6, at 798 (stating that "opponents of Megan's Law claim that registration and notification constitute punishment because the law deprives a small group of offenders of their anonymity and could potentially subject them to ostracism, harassment, or vigilantism").

[940] *See* Doe v. Poritz, 662 A.2d 367, 372 (N.J. 1995) (stating that the community notification provisions of Megan's Law are constitutionally valid as long as they are reasonably designed to protect society and not designed to punish).

[941] *See* State v. Ward, 869 P.2d 1062, 1069 (Wash. 1994) (holding that limited "disclosure of registration information to the public does not impose additional punishment on registrants").

[942] *See Poritz,* 662 A.2d at 404-05 (holding that the registration and notification requirements of Megan's Law do not constitute further punishment, because they are carefully tailored to perform a regulatory purpose, and are, therefore, not excessive even if "some deterrent punitive impact may result"). *See also Ward,* 869 P.2d at 1070 (holding that the potential burdens placed upon sex offenders by the statute "fit the threat posed to public safety" and "arise from the offender's future dangerousness, not as punishment for past crimes").

[943] Doe v. Poritz, 662 A.2d at 372 (maintaining that the community notification provisions, given their "remedial purpose, rationality, and limited scope . . . are not constitutionally vulnerable because of [their] relative impact on offenders").

prohibition against punishment.[944]

RONALD K. CHEN: I agree with just about everything Mr. Feldman just said. Particularly, I was very heartened to hear that he agrees—and this has been my major concept point too—that the inquiry into what constitutes punishment must involve an inquiry into effect, not merely intent.[945]

JANE GRALL: I want to correct that, too. We all agree to that proposition, and the New Jersey Supreme Court does not come even close to saying intent is all that is necessary.[946]

RONALD K. CHEN: I think we all agree with that proposition. Discerning the effective meaning of Chief Justice Wilentz's opinion is something that could keep the law professors or lawyers in this room occupied for many years.[947] I would agree that the Supreme Court

---

[944] *See* State v. Ward, 869 P.2d at 1072, 1074 (concluding that appropriate and necessary notification of the public does not constitute punishment for purposes of an *ex post facto* analysis). *But see* Artway v. Attorney General., 876 F. Supp. 666 (D. N.J. 1995) (finding that the Tier Two and Tier Three levels of public notification constitute a form of punishment, and, therefore violate the Ex Post Facto Clause), *aff'd in part and vacated in part*, 81 F.3d 1235, 1234 (3d Cir. 1996) (holding the constitutional challenge unripe, and describing the tier system as a risk-determination scale with corresponding levels of community notification).

[945] The first step in determining whether a statute is punitive or regulatory for *ex post facto* purposes involves a review of the legislature's intent in enacting the measure. Doe v. Pataki, 919 F. Supp. 691, 699 (S.D.N.Y. 1996). If such intent is clearly punitive, no further inquiry is necessary. *Id.* The mere fact that the intent is regulatory, however, does not end the inquiry. *Id.* Thus the court must undertake a historical and functional analysis to determine if the statute's effect is punitive. *Id.* at 699-700.

[946] *But see* Michael Booth, *U.S. Rift Leaves Megan's Law Fate Unclear*, N.J.L.J., July 31, 1995, at 1 (reporting that New Jersey Deputy Public Defender Matthew Astore opined that Judge Wilentz relied heavily on legislative intent and really did not consider the effect of the law when reaching his decision in *Poritz* (662 A.2d 367)).

[947] *See, e.g.*, Doe v. Poritz, 662 A.2d 367, 422 (1995) (stating that the judges "sail on truly uncharted waters," and acknowledging the "unavoidable uncertainty of [their] decision").

opinions as to what constitutes punishment, and the methodology for determining that, are capable of several interpretations.[948] The language in *Austin*[949] and *Halper*[950] suggests that if a provision cannot solely to be said to serve a legal purpose, but can be said to serve, at least in part, a retributive or a deterrent goal, or words to that effect, then it is punishment.[951]

With regard to all of the comments that suggest that notification is a method of protecting the public or just allowing the public to know, I can say yes, that is exactly what it is. But it also, at least in part, has served the goal of retribution[952] or deterrence.[953] As I read *Austin*[954] and

---

[948] *See generally* Christine M. Kong, *The Neighbors are Watching: Targeting Sexual Predators with Community Notification Laws*, 40 VILL. L. REV. 1257 (1995) (comparing several opposing holdings from different courts analyzing notification statutes under the tests set forth by the Supreme Court); Goodman, *supra* note 6, at 787-88 (stating that the Court in Doe v. Poritz (662 A.2d 367 (1995)) rejected the challenger's interpretation of a line of Supreme Court cases concerning the methodology for determining what constitutes punishment, and interpreted the cases very narrowly to come to a different conclusion).

[949] Austin v. United States, 509 U.S. 602 (1993) (holding that statutory civil forfeiture under 21 U.S.C.A. §§881(a)(4) and (a)(7) (West 1995) (which provides for the forfeiture of vehicles and real property used to facilitate the commission of certain drug related crimes) constitutes "a monetary punishment and, as such, is subject to the limitations of the Excessive Fines Clause" of the Eighth Amendment). The defendant in this case pled guilty to one count of possessing cocaine with intent to distribute in violation of South Dakota law, and the United States filed an *in rem* action in federal court against his mobile home and auto body shop under 21 U.S.C.A. §§881(a)(4) and (a)(7). *Id.*

[950] United States v. Halper, 490 U.S. 435 (1989) (holding that a statutory penalty imposed by the civil False Claims Act (U.S.C.A. §§ 3729 - 3731) violated the Double Jeopardy Clause because a defendant who had already been criminally prosecuted (in this case for filing false Medicare claims) may not be subjected to an additional civil sanction that cannot be fairly characterized as remedial, but only as deterrent or retributive).

[951] *See id.* at 448; *Austin*, 509 U.S. at 603.

[952] *See, e.g.*, Rowe v. Burton, 884 F. Supp. 1372, 1379 (D. Alaska 1994) (noting that the "consequences [of the Alaska notification law] may have a deterrent effect on offenders and may visit retribution on registrants").

[953] *See* Artway v. Attorney Gen. N.J., 876 F.Supp. 666, 690 (D.N.J. 1995), *aff'd in part and vacated in part*, 81 F.3d 1235 (3d Cir. 1996). "Megan's Law, in application, would deputize every member of registrant's community and thus achieve the ultimate

Halper[955] that is all that is necessary to show that it is punishment,[956] therefore, you cannot exact it after the fact. Now the long-term question of whether community notification imposes an undue, unbalanced imposition upon the privacy rights of the individual is a completely different question, and actually that really has not been litigated yet.[957]

JOHN J. GIBBONS: A substantive due process challenge on privacy grounds was asserted,[958] but has never been determined by any court, at least in New Jersey.[959]

PATRICK REILLY: Does anyone want to comment on what would be needed to prove that, under substantive due process, the law is constitutional? [Professor Gibbons] raised the issue of substantive due process, and that it has not been litigated. Does anyone have an opinion on it?

JOHN J. GIBBONS: One observation which has been made today strikes me as somewhat misleading. It has been said that it is only public information that is being made the subject of the notifications. That is not true. The notification includes the notification of the classification into which an individual is placed.[960] These people are

---

deterrent against re-offense by the registrant. This stated objective, regardless of how innocuously it has been couched by the legislature, clearly constitutes a traditional element of punishment: deterrence." *Id.*

[954] Austin v. United States, 509 U.S. 602 (1993).

[955] United States v. Halper, 490 U.S. 435 (1989).

[956] *See id.* at 448.

[957] *But see* Doe v. Poritz, 662 A.2d 367, 411 (N.J. 1995) (upholding New Jersey's registration and notification laws against a right to privacy challenge, the Court found that the state's interest in protecting communities substantially outweighed the offender's limited privacy interests under the United States and New Jersey Constitutions).

[958] *Id.*

[959] *Id.*

[960] N.J STAT. ANN. §2C:7-8(C) (West 1995).

being classified by the state as medium risk or high risk offenders in a very slipshod proceeding in which they have the burden of proof.[961] You cannot ignore the fact that that very classification is stigmatizing. It affects a privacy and a liberty interest.[962]

JANE GRALL: I do not want to ignore that we do additionally disclose such classifications in New Jersey.[963] The disclosure of those classifications cannot be considered punishment for the past act because classification depends on a prediction made at the present time which is unrelated to the past act.[964] And now, with the New Jersey Supreme Court's modification to provide a due process hearing,[965] it becomes even more attenuated from the initial crime and a claim that it can be punishment for that act. It is a judicial proceeding to determine the risk of offense relative to other offenders at the time of notification, not at

---

[961] If an individual has been classified as a low, medium or high risk sex offender in New Jersey, he may object to such classification and request a judicial hearing at which he has the burden of persuasion. *See* Doe v. Poritz, 662 A.2d. 367, 383 (N.J. 1995).

[962] *See* Doe v. Poritz, 662 A.2d at 420. "[I]f classified in Tier Two or Three, plaintiff's name and standing in the community would be threatened to the extent that his prior undisclosed criminal history and his new classification became known. We conclude that the consequences to the plaintiff's reputation from classification . . . implicate a liberty interest." *Id.*

[963] N.J. STAT. ANN. §2D:7-8(c)(3) (West 1995) (stating that the statute authorizes the New Jersey Attorney General to promulgate guidelines for community notification).

[964] *But see Risk Assessment supra* note 396. This form is utilized to arrive at a numerical assessment of an offender's risk to the community, taking into consideration criteria which fall under the categories of seriousness of the offense, offense history, characteristics of offender, and community support. *Id.* Offense history includes the sub-categories victim selection, number of offenses/victims, duration of offensive behavior, length of time since last offense, and history of anti-social acts. *Id.*

[965] Doe. v. Poritz, 662 A.2d 367, 382 (N.J. 1995) (requiring that sex offenders be afforded an opportunity to object to their risk-level classifications during judicial hearings designed to protect "private interests in privacy and reputation" and to ensure that "deprivations of those interests occur only when justified by the risk posed by the offender").

the time of the offense or conviction.[966]

PATRICK REILLY: Most of the criteria and the guidelines are taken from a period when the person actually committed the crime, are they not?

JANE GRALL: Several of the criteria are based on the commission of the most recent crime and the prior crimes that the person may have committed, but there are also many factors that are determined on the basis of the response to treatment and recent behavior.[967]

PATRICK REILLY: Is it possible to get a Tier Three classification just on the basis of the crime?

JANE GRALL: No, I do not believe so.

PATRICK REILLY: If you scored at the highest levels of the Sex Offender Risk Assessment Scale for the categories of degree of force,

---

[966] The *Poritz* Court outlined New Jersey's three-tier classification process. *Id.* at 383-84. To determine the appropriateness of Tier One notification, "the characteristics of prior offenses or of the offender are relevant only to the risk of re-offense, i.e., the likelihood of its occurrence." *Id.* at 383. To determine if Tier Two notification is appropriate:

> the State's prima facie case shall include a description of the class of sex offenders required to register who constitute low-risk offenders, including a description of that risk, which need not necessarily be statistical . . . some proof in the form of an expert opinion or otherwise that the moderate-risk offender class poses a risk of re-offense substantially higher than the low risk class, and that the offender before the court is a moderate-risk offender who poses such a substantially higher risk. *Id.*

For Tier Three notification, the State's case must include the low-risk and moderate-risk requirements as well as those same requirements as they are applied to high-risk offenders. *Id.* at 383-84.

[967] *Id.* at 404 (stating that "the notification is not based solely on prior conduct, but on the offender's record after conviction, after release, the record up to the very date of Tier classification and notification, including responsiveness to treatment . . .").

degree of contact, age of victim, victim selection, number of offenses and victims, duration of offensive behavior and history of anti-social behavior, and you had a drug history, would you remain a high risk forever?[968]

JANE GRALL: I do not think that is correct. I think it is possible to get a Tier Two [assessment] on the basis of the crime alone.[969]

AUDIENCE MEMBER: I believe that the New York State law provides for out-of-state offenders to have to register in New York ten days after they come into the state.[970] Is that a fairly common provision in all the states? If not, is there an inter-state compact or agreement that might address a common provision?

JANE GRALL: It is also a requirement in New Jersey.[971] The federal law, which only requires registration, not community notification, serves

---

[968] *See Risk Assessment, supra* note 396. The base rates for each of the thirteen risk factors included within the scale's four general categories are modified by the multipliers assigned to low, moderate and high risk behaviors. *Id.* For instance, the category entitled 'Seriousness of Offense' includes an assessment of the degree of contact, which has a base rate of five points. *Id.* That sub-category is ranked as follows: a low risk multiple of zero is based on no contact or fondling over clothing; a moderate risk multiplier of one is based on fondling under clothing; and a high risk multiplier of three is based on penetration. *Id.* An offender's final score determines his or her risk level: zero to thirty-six points is considered low risk (Tier One), thirty-seven to seventy-three is considered moderate risk (Tier Two) and seventy-four to 111 is considered high risk (Tier Three). *Id.*

[969] A first time offender, who responds well to treatment and has a good degree of community support would only be placed in Tier Two, no matter how serious the offense was. *Id.*

[970] N.Y. CORRECT. LAW §168-k (McKinney 1996). The New York statute also provides for notification of appropriate law enforcement agencies of an offender's move from New York to other states. *Id.* at §168-f(4).

[971] N.J. STAT. ANN. §2C:7-2(3) (West 1996) (noting that "[a] person moving to or returning to this State from another jurisdiction shall register with the chief law enforcement officer of the municipality in which the person will reside . . . within . . . 70 days of first residing in or returning to a municipality in this State . . . ."

as that inter-state compact.[972]

RONALD K. CHEN: I would assume that is a common provision in all these state notification statutes.[973]

JOHN J. GIBBONS: Yes.

AUDIENCE MEMBER: Having worked with sex offenders in Rhode Island, I discovered that many of them, if not most of them, search very carefully for the victim. They do not take the kind of victim that might have a very close parent relationship, or a parent who is likely to look out for and be concerned about there being a sex offender in the neighborhood. The offenders search out those very lonely children who have hardly any parental relationship or have a gap in that relationship. It is as though they have another sense, a sensation of who is a vulnerable child, and they will search out that child.

JANE GRALL: That has not been our experience in New Jersey at all. Take, for example, the four instances I mentioned earlier. Megan was lured from her backyard while the family was around.[974] Another child was lifted over a fence in the backyard she was playing in, while her

---

[972] 42 U.S.C.A. §1407 (West Supp. 1996) (establishing guidelines for state registration programs). The Federal statute imposes a duty upon local law enforcement agencies to inform those in other states of a sex offender's move to their jurisdiction. *Id.* at §1407(b)(1)(A)(III).

[973] *See* Bedarf, *supra* note 190, at 889 (referring to similarities among the nation's sex offender registration laws, the author states that "sex offenders generally must register with the chief of police in the area in which they intend to live").

[974] Megan Kanka, after whom Megan's Law was named, had walked across the street from her home to play with her dog when Jesse Timmendequas allegedly abducted her to his neighboring home, where he allegedly raped and killed her. *See* Mike Kelly, *A Town's Innocence Lost: Memories Strong One Year After Megan Kanka's Death*, THE RECORD (New Jersey), July 27, 1995, at A1.

mother and her aunt were inside of the house.[975] Another child was playing on the street with her siblings, when somebody offered her a quarter to run around the corner to see how fast she could do it. The last that anybody saw of her was when she turned the corner.[976] Each one of the instances fall outside of your scenario. I am sure there are instances like that, but those were not the cases that we were exposed to.

PATRICK REILLY: There are a number of criticisms of Megan's Law on social grounds. Perhaps we can hit them.

AUDIENCE MEMBER: In the past ten years, there has been no report of recidivism of anyone in the Rhode Island treatment program I work for.[977] There is careful supervision of every offender after treatment. They agree not to accept employment or do not live in a place that would endanger the program. They have to commit to those requirements when they enter the treatment program, and they also commit to continuous supervision afterwards.[978]

PATRICK REILLY: One of the arguments against Megan's Law is that it effectively drives the sexual offenders out from the suburbs into the

---

[975] David Cooper was convicted for the murder of six-year-old Latasha Goodman whom he raped and strangled after luring her from her aunt's yard with an offer of ice cream. *See* Sue Epstein, *Death Sentence Given in Rape, Strangling of Girl*, STAR LEDGER (Newark), May 18, 1995.

[976] Conrad Jeffrey, a mentally ill parolee, raped and suffocated seven-year-old Divina Genao who was lured by his offer of a quarter. *See* Elaine D'Aurizio, *Cop Beheld Divina's Birth, Death*, THE RECORD (New Jersey), June 23, 1996, at A1.

[977] The speaker is referring to the Adult Correctional Institute (ACI) in Rhode Island, where approximately one hundred men participate in the Sex Offenders Treatment Program run by Peter Loss. *See* Felice J. Freyer, *Innocence Lost, Child Sexual Abuse in Rhode Island: Prison Program Aims to Break Cycle of Sex Abuse*, PROVIDENCE SUNDAY J., Aug. 25, 1996, at A1.

[978] For a full description of the Rhode Island program, *see id.*

inner cities, where notification has no meaning.[979]

ROBERT FARLEY: When you are dealing with a suburban community where the police force is at a higher percentage per individual, it is easier to ensure public safety and to keep track of somebody than it is in an urban area.[980] However, this statute does not discriminate against different areas. Additionally, one can discover, pursuant to our community notification statute, where the person is regardless of whether it is in a city, a suburban area or an affluent area. Certainly there are more crimes and it is easier to hide in the cities.[981] Yet I do not think that is going to drive people to the cities. They are going to remain where they are, but now they are going to be registered as well.

PATRICK REILLY: Did that not occur in New Jersey under New Jersey laws?[982]

JANE GRALL: I do not see any evidence of that happening. In New Jersey, the scope of notification, or how broad the notification can be, is something that the offender can challenge.[983] There is a different scope of notification applicable depending on what is appropriate under

---

[979] *See, e.g.*, Montana, *supra* note 180, at 582-83 (noting that "sex offenders find large cities and inner city areas attractive because law enforcement agencies in these areas usually lack the time and resources to enforce community notification laws. As a result, [those areas] have become havens for migrating sex offenders").

[980] *See, e.g., id.* at 584 ("Middle-and upper-middle class neighborhoods, which do not suffer from high levels of crime or a lack of funding, can successfully enforce Megan's Law.").

[981] *Id.*

[982] *See id.* at 580 n.48 (citing Carlos Diaz as an example of a man who left New Jersey in order to avoid application of the sex offender notification law against him).

[983] *See* Doe v. Poritz, 662 A.2d 367, 378 (N.J. 1995) (requiring that sex offenders be afforded a hearing to object to their risk-level classifications). For a discussion of defendants' rights with regard to sex offender notification laws, *see generally* Goodman, *supra* note 6.

the circumstances.[984] That scope is determined at the judicial hearing.[985] Prosecutors are bringing maps to those hearings which indicate exactly which areas they are planning to notify. I do not think there is any reason to believe that is going to be less effective in the cities.

RONALD K. CHEN: I will make what I think is a neutral statement. At this point, and for some time to come, I do not know if we are going to have anything more than anecdotal evidence to support or contradict the proposition that these laws are going to force registrants in search of anonymity into urban and poor areas. I already related the two anecdotes about both Judge Gibbons' client and mine, who both left the state because of the pressures put upon them and their families.[986] I do not offer that as evidence, nor even presumptive evidence, of what would happen in the long term. My concern is that there will never be anything more than anecdotal evidence. Of course, there exist better experts than I on this matter. And it is difficult to obtain valid empirical evidence, given the fact that the people involved are attempting to not be found.

AUDIENCE MEMBER: Or they commit their crimes someplace else

---

[984] *See* Doe v. Poritz, 662 A.2d at 378-80 (N.J. 1995) (explaining that the Attorney General has, pursuant to the powers granted by the notification statute, adopted guidelines which provide a fluctuating system of notification based on the assessed risk of future offense).

[985] The Attorney General must notify the offender on an imminent Tier classification so that he or she may be afforded an object to the classification during an *in camera* hearing. *Id.* at 367. The offender bears the burden of persuasion at that hearing. *Id.*

[986] Professor Chen represented Carlos Diaz, and Judge Gibbons represented Alexander Artway, both of whom challenged the constitutionality of New Jersey's sex offender registration and notification law. *See* Diaz v. Whitman, No. 94, slip op. at 9 (D. N.J. Jan. 3, 1995); Artway v. Attorney General, 876 F. Supp. 666 (D. N.J. 1995), *aff'd in part and vacated in part*, 81 F.3d.1235 (3d Cir. 1996).

where they do not live, or on the internet.[987] At Avenel, for instance, half of the inmates have computers, and they can hardly wait to get on line to commit crimes.[988] They do not necessarily offend where they live.[989]

JOHN J. GIBBONS: I am principally concerned with whether the law is constitutional. This issue simply has nothing to do with that. Nevertheless, I will make a prediction. It is going to have the same fate in ten years as the drug user registration statute in New Jersey had.[990] Notification will become a nuisance to law enforcement and they will stop doing anything about it. Eventually, it will be repealed.

---

[987] The federal government has recognized the possibility that sex crimes may occur via the internet, but attempts to restrict online speech which is deemed indecent have been the subject of controversy. *See, e.g.*, ACLU v. Reno, 929 F.Supp. 824 (E.D.P.A. 1996) (striking down a statute which censored materials appearing on the internet).

[988] *Contra,* Telephone Interview with Grace Rogers, Assistant Superintendent of the Adult Diagnostic and Treatment Center at Avenel, N.J. (Oct. 24, 1996). According to Rogers, as of September 30, 1996, inmates only have access to classroom computers. *Id.* Although some inmates did have computers in their cells before a ban was imposed during September, 1996, they were not equipped with modems which would provide internet access. *Id.*

[989] *See* Montana, *supra* note 180, at 593. Megan's Law does not require law enforcement officials to notify surrounding communities, presuming that convicted sex offenders will only re-offend within the notified community. *Id.* Released sex offenders, however, who experience a compulsion to offend, will find a victim regardless of whether the victim resides in a notified or un-notified community. *Id.*

[990] N.J. STAT. ANN. §2A:169A-1-169A-10, *rep'd by* L. 1971, c. 231, §1, eff. June 23, 1971. *See also* Doe v. Poritz, 661 A.2d 1335, 1342 (Super. Ct. Law Div. 1995):

> The statute...requiredpersons previously convicted of narcotics violations to register with the police in the municipality of their residence. Registrants were required to carry a card evidencing the fact that they were in compliance with the law, and had to show this card to the police chief in any municipality they visited with the intention to stay more than twenty-four hours. *Id.*

DANIEL FELDMAN: When we were attempting to enact this law in New York, one frequent criticism was that it was just politically motivated, and it would create all kinds of damage without doing any good whatsoever.[991] We were, to a certain extent, relying on our own common sense in arguing otherwise. Since then, however, the Washington State study that appeared this autumn[992] has demonstrated two points that we had predicted, but have now been shown in reality. First, community notification enables members of the community to help the police overcome hindrances caused by their record-keeping problems. Therefore, released sex offenders who re-offend are apprehended more quickly than they had been in the absence of such a statute.[993] Second, they are apprehended for less serious offenses than would otherwise be the case.[994] So that what we had predicted has turned out, essentially, to be true. That is, while the released offender may commit one more sex offense, the released offender is less likely to commit six or seven more offenses before being apprehended the second

---

[991] *See,* e.g., Kevin Sack, *Bill to Track Sex Offenders Nears Passage*, N.Y. TIMES, June 27, 1995, at B1 (noting that lobbyists asserted that "[w]ith the Assembly Democrats feeling vulnerable on crime issues, particularly after [Governor] Pataki's victory last November, Mr. [Sheldon] Silver [Assembly Speaker and Manhattan Democrat] clearly faced intense political pressure not to oppose the bill").

[992] Donna D. Schram & Cheryl D. Milloy, *Community Notification: A Study of Offender Characteristics and Recidivism*, WASH. ST. INST. FOR PUB. POL'Y, Oct. 1995, at 16 (comparing recidivism rates among Washington sex offenders who were and were not subject to community notification).

[993] *See* Bedarf, *supra* note 190, at 909 (stating that police "lack the manpower to track offenders" and that community notification enables the community to provide additional labor to aid law enforcement); Feldman, *supra* note 238, at 2 (stating that communities aid police by identifying a suspect more quickly, and preventing "the offender from completing what would otherwise have been a series of attacks" (citing Schram & Milloy, *supra* note 992, at 16)). *But see id.* at 16 (noting that those who were subject to community notification re-offended more quickly than those who were not).

[994] *See* Feldman, *supra* note 238, at 2 (noting the reduction in degrees of crimes for which Washington sex offenders are re-arrested (citing Schram & Milloy, *supra* note 992, at 16)).

time.[995] Secondly, in situations involving loitering in a schoolyard, for instance, the offenders may even be apprehended before completing a rape or an attack, and both of those things have been borne out by the Washington State study.[996] I, therefore, would argue that it is fairly clear at this point that the statute does, in fact, do some good. Is it a panacea? Of course not, but it does increase safety to some extent.

PATRICK REILLY: The Washington State study found no reduction in the recidivism rate, correct?

DANIEL FELDMAN: Yes, that is the piece of it that people love to cite.[997] What they do not tend to cite are the findings concerning the nature of that recidivism.

PATRICK REILLY: That is correct. Does anyone want to make a final statement?

ROBERT FARLEY: I just want to thank everybody for participating today. It has been a wonderful discussion. I know that I have enjoyed it greatly. The Attorney General has worked with Dan Feldman.[998] We are working with Senator Skelos,[999] and we are quite confident that the New York statute is going to pass constitutional muster. Quite a bit of thought went into it and we were able, with the history and the ground-

---

[995] *See id.*

[996] *Id.*

[997] *See, e.g.*, Ball, *supra* note 206, at 440 n.247 (stating that the Washington Study did not demonstrate a reduction in the number of "repeat sex offenses" and that sex offenders "re-offended at a similar rate" regardless of whether they were subject to the notification law (citing Schram & Milloy, *supra* note 992, at 16)).

[998] *See* Billy House, *Pataki Signs Sex-Offender-Registry Bill*, GANNETT NEWS SERV., July, 25, 1995, *available in* 1995 WL 2902182 (noting that Attorney General Dennis Vacco, Senator Dean Skelos, and Assemblyman Daniel Feldman sponsored New York's version of Megan's Law).

[999] *Id.*

breaking of New Jersey, to follow that state's lead and make amendments to it. I think it is a statute which well deserves a long degree of history and praise.[1000]

[1000] *Id.* (stating that, according to Dennis Vacco, although New York's community notification law follows that of New Jersey, New York officials made "significant changes" to avoid the legal problems associated with the New Jersey law).